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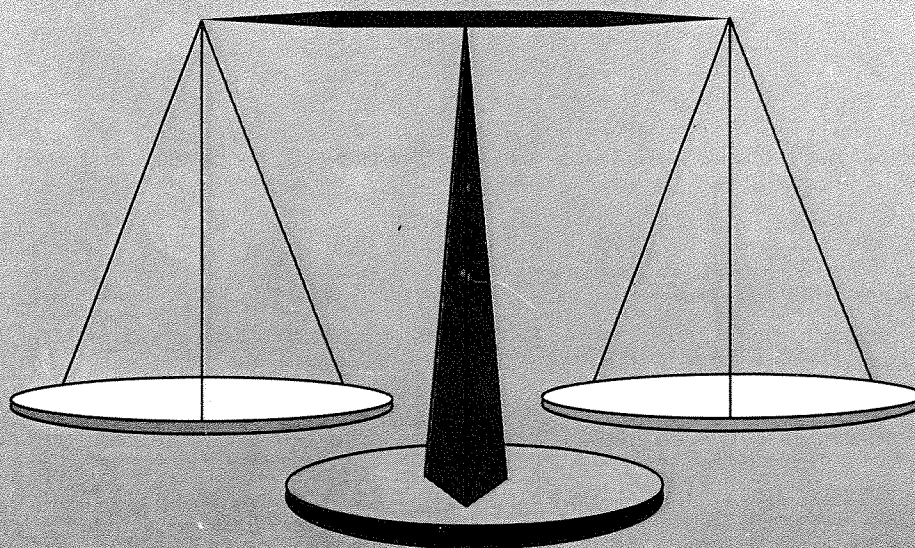
USAID Program and Operations Assessment Report No. 7



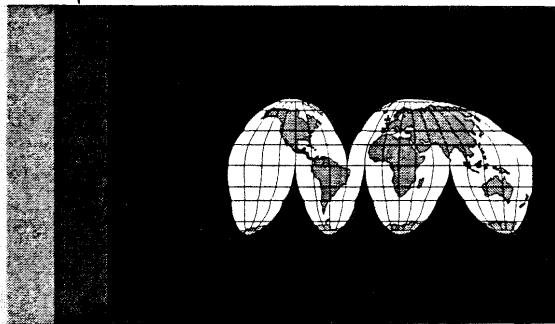
Center for Development Information and Evaluation

February 1994

Weighing In on the Scales of Justice



*Strategic Approaches for Donor-Supported
Rule of Law Programs*



USAID Program and Operations
Assessment Report No. 7

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Strategic Approaches for Donor-Supported Rule of Law Programs

by

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February 1994

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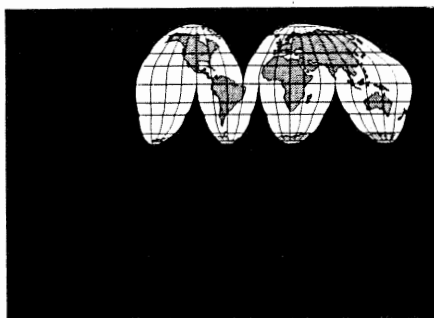
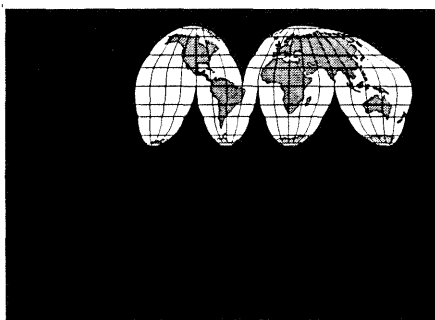


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Preface

In May 1992, the U.S. Agency for International Development (USAID) Center for Development Information and Evaluation (CDIE) initiated an assessment of donor-supported Rule of Law programs in Argentina, Colombia, Honduras, the Philippines, Sri Lanka, and Uruguay. During the subsequent 18 months CDIE teams of three to five people spent 1 month in each country¹ collecting data and interviewing observers of and participants in judicial reform efforts sponsored by USAID and the Asia and Ford Foundations.

The study drew on the energies, goodwill, patience, and expertise of many people too numerous to mention here. However, a few deserve special acknowledgment. We are especially grateful for the enthusiastic cooperation and assistance of the Asia Foundation, which allowed us to include as part of this study their project experience in the Philippines and Sri Lanka. The Foundation's long history of support of judicial reform greatly enriched our understanding of the art and craft of strategic thinking in law and development.

Richard Fuller, Stephen Claborne, and Jennifer Thambayah of the Asia Foundation staff in Sri Lanka; Erik Jensen of the Foundation's office in

Manila; and Gordon Hein of the home office in San Francisco gave generously of their time and wisdom about the process of reform in both countries. The Foundation and Erik Jensen in particular deserve special recognition for their pioneering roles in developing constituency building and access creation strategies; we have learned much from them. Terrence George of the Ford Foundation office in Manila gave us much help in these areas as well.

Within USAID, Pamela Baldwin in Sri Lanka, Emily Leonard and Karen Otto in Honduras, James Smith and Ana Maria Salazar in Colombia, David Nelson and Darlene Pridmore in the Philippines, and Robert Asselin and Juliana Abella in Argentina and Uruguay were the source of immeasurable knowledge and insights and were instrumental in orchestrating logistical and program support during the team visits.

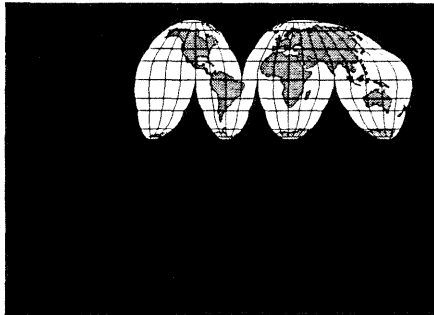
We also thank for their time and services the members of the six study teams: William Millsap (Colombia and Honduras); Arthur Mudge (Colombia); Ralph Smith (Honduras); Sidney Silliman (the Philippines); Robert Oberst and Jacki Vavre (Sri Lanka); and Richard Martin, Chris Sabatini, and Joseph Thome (Argentina and Uruguay). Mary

¹ Argentina and Uruguay were visited during a single one-month period.

Said served on all six teams. In addition, William Davis, Joel Jutkowitz, David Steinberg, and Malcolm Young contributed substantially to the study design and preparation and to the final review of reports. Finally, we would like to thank Farah Ebrahimi, Ursula Paquette, and Kathryn Becker for their editorial and production assis-

tance in preparing this report for publication.

Full responsibility for errors of omission and commission in the analysis and conclusions of this report rests on the shoulders of Harry Blair and Gary Hansen. The authors hope that any such errors will not detract from the valuable contributions of the individuals mentioned here.



Summary

Support for the Rule of Law (ROL) has emerged recently as a major component of an expanding portfolio of U.S. Agency for International Development (USAID) democracy programs. USAID investments in law programs date to the 1960s, but the current resurgence of activities in this area began in the mid-1980s with USAID's initiation of the Administration of Justice program in Latin America. Since the early 1990s, USAID ROL programs have spread to Asia and are starting up in Africa and in Eastern Europe and the Newly Independent States.

In 1992, USAID's Center for Development Information and Evaluation (CDIE) assessed donor-supported ROL programs in six countries: Argentina, Colombia, Honduras, the Philippines, Sri Lanka, and Uruguay. The assessment was both prospective and retrospective, with its central purposes to

- Assess recent donor experience in ROL
- Develop criteria for initiating ROL programs
- Propose a strategic framework for setting ROL priorities and designing country programs

Criteria for Country Investments

A range of generic criteria for determining whether a country's environment might support ROL reform emerged from the six case studies.

For example, knowing the level of potential support or opposition among political elites and organized constituencies (such as bar associations, commercial organizations, and nongovernmental organizations [NGOs]) is especially crucial for deciding whether investments in legal and judicial reform can yield significant positive results. Similarly, such factors as judicial autonomy, corruption, media freedom, and donor leverage are critical in determining the prospects for successful donor-supported reform.

A Framework for Strategy Design

The case studies also facilitated the development of an analytical framework for USAID planners to use to identify and sequence investment priorities and strategies for effecting sustainable ROL reforms. As shown in Figure 1 and Table 2 of the report, the studies identified four essential needs and matching strategies for addressing these needs. In sequential order these needs and strategies are

- *Host country political leadership in support of ROL reforms.* If political leadership is weak and fragmented, donors will need to support *constituency and coalition building strategies* to strengthen political and public pressure for reform.
- *Adequate legal system structures.* If sufficient political support exists but the legal system

structures are weak, donors will need to emphasize a *structural reform strategy*.

- *Accessible and equitable legal system.* Where political will and legal structures are relatively adequate but the accessibility and equity of the legal system are deficient, donors will need to focus on *access creation strategies*.
- *Institutional capacity.* Once the first three strategic conditions are judged favorably, emphasis should be placed on the institutional capacity of existing legal structures to perform their intended functions. Where capacity is inadequate, donors will need to engage in *legal system strengthening strategies*, which generally include the kinds of institution building efforts that USAID traditionally has supported.

The analytical framework is intended as a tool to help donors set program priorities. Because, in reality, answers to the questions posed here are seldom simply or completely a “yes” or “no,” donors will likely pursue more than one ROL strategy at any particular moment. The value of the framework is in helping to determine when each of the four strategies should predominate. The experiences in the six countries studied suggest that a proper sequencing of the four strategies is very important. For example, in many countries building constituencies and coalitions to create demand for structural reform should take place before early and heavy investments are made in supply or legal system strengthening endeavors.

Other characteristics of the framework should be highlighted as well. First, the framework indicates that the formulation of ROL strategies should be problem driven; that is, program planners should identify the host country weaknesses in ROL that seriously constrain democratic development. Second, the framework defines reform as a political process that cannot simply be reduced to conventional technical assistance or to institutional development strategies. Third, because ROL reforms are political, donors must often devote more attention to designing strategies that facilitate host country demand for reform instead of the more traditional supply-side assistance strategies.

Lessons on Strategy Effectiveness

The case studies shed light on issues and offer insights about the strategies’ application and effectiveness. Thus a *coalition building strategy* to forge elite commitment to reform was tried in several countries but was successful in only one. *Constituency building* efforts to mobilize support in the nongovernment sector were undertaken in several countries but thus far have met with mixed success.

From the countries’ limited experience with constituency and coalition building strategies, several important lessons can be drawn. First, this strategy is critically important for generating demand for reform, and donors must emphasize more activities in this area. Second, potential constituencies, such as bar associations and the commercial sector, vary considerably as sources of support for reform. Third, free and effective media are needed to implement a successful coalition- and constituency-building effort.

Structural reform strategies refer to the rules governing the legal system, which usually are reflected in constitutional provisions and laws. Undertaking a donor-supported structural reform strategy can be rewarding, although it often presents a formidable challenge, because legal rules frequently emanate from political sources outside of the judicial system. In several of the countries studied, USAID found opportunities to support the introduction of merit-based career systems in the judiciary and of oral trial procedures.

In the review of how well structural reform strategies perform, several lessons emerged. First, once structural reforms are consummated, enforcement mechanisms must be made strong enough to ensure that governments are held accountable in carrying through promised reforms. Second, because structural reforms may encounter strong resistance from entrenched interests, donor investments to help create new institutions may yield greater returns than attempts to reform existing institutions. For example, in five of the six

countries, governments, with some donor assistance, are creating mechanisms for alternative dispute resolution (ADR) to bypass court systems that are frequently unresponsive to reforms.

In several countries donor-supported *access creation strategies* were used to make legal services more available and affordable to low-income people who lack the means and knowledge for seeking resolution of disputes or redress of grievances when their rights have been violated. These efforts have included providing legal aid, strengthening public defender staff, training paralegals, creating ADR mechanisms, conducting legal literacy campaigns, and supporting legal advocacy NGOs.

A range of lessons emanate from the review of access creation strategies. First, the reach and impact of conventional legal aid activities, legal literacy campaigns, and paralegal training are often quite limited if the strategies are pursued as discrete efforts. When integrated around specific needs and issues, these activities become much more effective. Legal advocacy NGOs are demonstrating good results from using an integrated access strategy and therefore show promise for donor investment. Second, the introduction of ADR mechanisms can provide a valued and well-used service but one requiring close and continuous management supervision for quality control.

Legal system strengthening was supported by USAID and other donors in all six countries. This strategy generally comprises the traditional institution building activities, including the introduction of new systems for court administration, recordkeeping, and budget and personnel management; the design and conduct of pre- and post-entry training programs for judges, court staff, and lawyers; and the acquisition of modern technology such as computers for case tracking.

The most important lesson concerning legal system strengthening is that it is not necessarily the best place to begin an ROL development program. Rather, this strategy is most effective when the conditions that the initial three strategies sought to achieve are sufficiently in place. A second lesson is that getting a firm grip on quantitative aspects of court delay is a very difficult task.

Collecting such data is only the first step in understanding where and why bottlenecks, delays, and backlogs occur.

Crosscutting Lessons

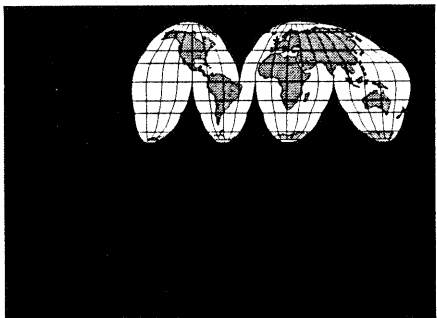
The assessment highlighted several implications that crosscut the four strategies:

- *Preconditions* for undertaking an effective ROL program may be marginally present at best in many countries; thus ROL development efforts are not appropriate everywhere. Of course in some cases, donors may be directed to invest in ROL programs without such preconditions; where this occurs, the risk of failure must be judged high.
- In countries with both favorable and unfavorable conditions for reform, an initial *strategy of constituency and coalition building* may be needed before other strategies are emphasized.
- Where ROL programs find themselves constrained to engage in legal system strengthening efforts, even though political will appears weak or absent, such efforts may be a *transaction cost* of initiating constituency and coalition building activities.
- A *hierarchy of institution building problems* exists, and difficulty increases with each ascending step. Commodity drops, human resource training, and improved management systems are least difficult; changes in organizational structures and subcultures are most difficult.
- Donor ROL projects are often *cost efficient but staff intensive*. Although in many cases ROL projects do not require large outlays of financial assistance, they are frequently demanding of donor staff in facilitating processes of dialogue and change within host country institutions.
- Holding the justice system accountable for what it does is essential to democratic sustainability. The two most important ingredients in maintaining accountability in this regard are *active constituencies and coalitions* that demand a high quality of justice and a *free press* that can point to lapses in the system.

- The most popular of the strategies employed in the countries studied was the *ADR mechanisms*, with representation in five of the six cases. This pattern suggests that such mechanisms should be given increased attention in future USAID planning in the ROL sector.
- USAID can serve effectively in a *pioneering or trailblazing capacity* in the ROL field, acting as an experimental, risk-taking innovator to develop approaches that can, when proved, be taken over by multilateral

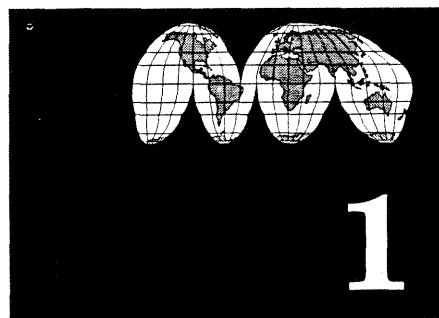
donors willing to make substantial investments in this sector.

- ROL development programs receive a considerable boost when there is a *policy convergence* between host country government priorities and those of the U.S. government.
- Using *intermediary organizations as ROL program managers* can be highly effective. The type of intermediary used varied among the six countries from U.S. or host country NGOs to the United Nations Development Programme.



Glossary

ADC	advanced developing country	ICITAP	International Criminal Investigative Training Assistance Program
ADR	alternative dispute resolution		
CDIE	Center for Development Information and Evaluation, USAID	LDC	less developed country
		MIS	management information system
CERES	Centro de Estudios de la Realidad Económica y Social (Center for Economic and Social Studies), Uruguay	NGO	nongovernmental organization
		NJRC	National Judicial Reform Commission
FME	Fundación para la Modernización del Estado (Foundation for State Modernization), Argentina	ROL	Rule of Law
		SAL	Social Action Litigation
IBP	Integrated Bar of the Philippines	USAID	U.S. Agency for International Development



Introduction

The development of legal systems in support of Rule of Law (ROL) has emerged as a major goal in the U.S. Agency for International Development's (USAID) expanding portfolio of democracy programs. USAID and other donor agencies have entered an era in which they are generating a wider and richer base of knowledge about the process of effecting legal change. In this context, and in seeking to advance the state of the art about legal development, the purposes of this study are threefold:

- To *assess recent donor experience* in ROL
- To *propose a strategic framework* for assessing investment priorities in ROL programs in a country context
- To provide guidance about how to *design country program strategies* once judgment has been made that such investments are warranted

The proposals and analyses contained in this paper are based on field studies of six countries—Argentina, Colombia, Honduras, the Philippines, Sri Lanka, and Uruguay—undertaken by USAID's Center for Development Information and Evaluation (CDIE). CDIE selected the countries on the basis of two criteria. First, each country had a recent history of USAID, Asia Foundation, or Ford Foundation investment in legal development.¹ Among the bilateral and international donors, USAID and the Asia and Ford Foundations have the longest standing and most extensive experience with justice sector programs. The study includes insights drawn from this rich base of experience.

For comparative purposes, the second criterion included differentiation of the sample according to the level of development in each country. Thus three of the countries (Honduras, the Philippines, and Sri Lanka) are what most donors would consider less developed countries (LDCs) and three (Colombia, Argentina, and Uruguay) are designated as advanced developing countries (ADCs).² This

¹ The variety of ROL assistance found in the six countries is shown in Table 1 of the appendix. The major ROL program efforts analyzed are depicted in Table 2 of the appendix.

² Table 3 of the appendix briefly analyzes the six countries in terms of their relative levels of development. An earlier version of findings for the three LDCs appeared as Hansen (1993).

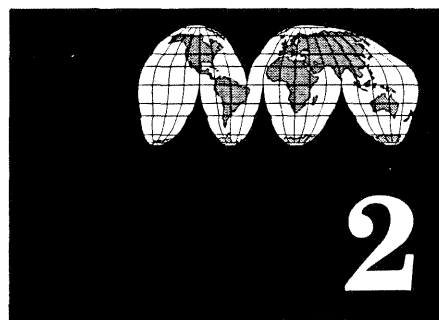
distinction is important because USAID will be investing more resources in Eastern Europe and the Newly Independent States, which more closely resemble ADCs in such areas as institutional infrastructure and human development.

The report is structured to provide the following:

- Some initial background information on USAID

support of democracy and law programs

- An analytical framework for investment in ROL programs
- Four alternative (although often complementary) strategies for legal development
- Some important USAID crosscutting issues and recommendations for ROL programs



A Historical Overview of ROL Programs

First Generation: The Law and Development Decade

Law has been a longstanding focus of interest and investment in USAID's history of support for projects involving democracy objectives. Indeed, USAID's experience in this area is sufficiently broad to encompass four generations of ROL development efforts.

The first generation of activities, the "Law and Development Decade," began in the early 1960s, when the Ford Foundation and USAID helped develop faculties of law in a wide array of African, Asian, and Latin American countries. Law faculty from many of the major law schools in the United States taught and advised students abroad, and faculty from developing countries were in turn sent to the United States to learn the most advanced approaches in legal education. The Law and Development program's objective was to enhance the capacities of law schools in developing countries to train cadres of lawyers who, schooled in concepts and practices of Western law, would spearhead the political and economic modernization process.

But by the early 1970s the Law and Development program had become an object of increasing controversy. From within and without the program came the criticism that the program was imperious and ethnocentric in its effort to transplant Western notions of law into non-Western settings. By the mid-1970s the Law and Development program had ended and the popularity of the modernization theory

on which much of the program was premised had diminished.

Second Generation: The New Directions Mandate

The Law and Development program was succeeded in the mid-1970s by the New Directions mandate, which ushered in a second generation of legal development efforts. The new era emphasized alleviating poverty by meeting basic needs and giving the poor a larger voice in the development process. One activity carried out under New Directions focused on making legal services accessible to the poor through legal aid projects.

In the late 1970s, USAID's legal development efforts assumed a larger focus on human rights, particularly on people whose rights were violated because they had voiced political dissent. In addition, the promotion of women's rights as part of the Agency's new Women in Development program assumed priority in the legal development agenda as well.

Although USAID supported legal aid projects in a number of countries, the effort was not given high priority in many USAID Missions. However, the Ford and Asia Foundations did pursue legal aid as an important objective and continued to refine their strategies in this sector throughout the 1970s and 1980s. Thus both Foundations have actively supported legal aid, mediation boards, law education,

and legal advocacy organizations. In addition, the Foundations have assisted organizations that seek to generate policy dialogue and public pressure for judicial reform. Accordingly, strengthening think tanks, investigative journalism, and public opinion polling have been targets of Foundation investments.

Third Generation: Administration of Justice

A third generation of USAID investment in the legal sector began in the early to mid-1980s with the initiation of court reform efforts in Central America. The move toward court reform started after the murder of nuns in El Salvador, which had prompted the U.S. Congress to allocate funds for improving Salvadoran courts and police. Subsequently, in response to recommendations of the Kissinger Commission, judicial and police improvement programs were initiated throughout Central America and the Caribbean. Also, in the mid-1980s and late 1980s judicial projects were started to support the emergence of more democratic regimes in South America.

Judicial improvement projects in Latin America, carried out through the Administration of Justice program (widely known by its acronym [AOJ]), constitute a major component of USAID-sponsored democracy programs in the region. The primary emphasis of this effort has been on enhancing the stature of the judiciary to strengthen new and fledgling democratic regimes in the region. For various reasons, in many Latin American countries, public confidence in the efficacy of the courts has been eroding.

The authority and autonomy of the courts in Latin America were seriously compromised during the interregnum of authoritarian and military rule in the period between the mid-1960s and mid-1980s. In addition, inefficiencies in court administration and procedure produced enormous case congestion and delays in case processing. The courts have also been frequently ineffective in criminal prosecu-

tions because prosecutors and the police lack the training and scientific capacity for gathering and analyzing evidence. Finally, the courts' integrity has been compromised by the politicization of judicial appointments and public perceptions of corrupt practices within the judiciary.

In addressing these problems, most USAID legal system programs in Latin America have focused on improving the courts' effectiveness and efficiency. Project activities have included modernizing court administration, including automating case processing, legal codes, personnel systems, and budget and planning systems; training judges; hiring more judges, public defenders, and public prosecutors; expanding and strengthening the role of public defenders; reforming penal codes; and introducing career and merit appointments for judges and other judicial personnel.

The Latin America program has also emphasized the professionalization of police forces. Most of these efforts have been carried out by the Department of Justice under the International Criminal Investigative Training Assistance Program (ICITAP). National and regional training courses have focused on improving police skills in criminal investigation, forensics, case management, judicial protection, ethics and professional standards, and police management. In response to citizen complaints, the program has helped police units investigate improper police behavior.

Fourth Generation: ROL

In the early 1990s, USAID broadened the geographic and analytic perspectives of its law programs. Because support for democracy is emerging as a major Agency objective, USAID Missions worldwide are including law projects in the design and implementation of country democracy programs. Furthermore, the programmatic focus and content of these efforts are encompassing a wider array of objectives, strategies, and activities. In some countries USAID's approach involves focusing on issues of access, legal aid, and mobilization of public

demand for legal reform. In other instances more emphasis is on institution building within the formal judicial system.

Because USAID is entering an era in which a wider array of approaches to law and democracy programs is being used, a more systemic perspective is required than that implied by the older term "Administration of Justice." Therefore, this report refers to USAID activities involving legal development as "ROL programs and projects."³

Using the term "rule of law" suggests that USAID is moving into a fourth generation of program activities. Building on experience but moving beyond it as well, work in this new era is distinguished by the application of a broader range of strategies to enhance ROL and by corresponding refinements in our understanding of what strategies are appropriate under variable sociopolitical conditions. *Accordingly, this evaluation synthesis is intended to advance the process of strategic thinking on how to design fourth generation ROL programs.*

³ The term Rule of Law is also used in USAID's recent strategy papers on democracy (see USAID 1993a and 1993b).



3 Initiating ROL Programs

A first order question to explore is whether USAID should invest in an ROL program in a particular country context. The need for investment is clear in many LDCs and ADCs. They frequently share a common litany of deficiencies, including court congestion, antiquated laws and legal procedures, inadequate facilities and budgets, and undertrained court staff, judges, prosecutors, and public defenders.

In addition to such constraints to efficiency and effectiveness, the judicial system is often inaccessible to an impoverished population that is outside the protection of the law. Many courts are in urban areas, which the poor can reach only by traveling long distances often over nearly impassable roads. Lawyers' fees are far above what an average citizen can afford. And a general lack of legal literacy and trust in the judicial system discourages most people from seeking legal services.

These problems are largely an outgrowth of governmental structures and political environments that relegate the judicial system to a minor and deliberately underfunded appendage of the executive or legislative branch of government, thus keeping the courts from making their rightful contribution to good governance. Patronage in judicial appointments, outside interference in judicial proceedings, and corruption throughout the legal system prevent the courts from becoming a fair and objective arbiter of disputes.

Problems concerning the role of the judicial system become especially formidable where the executive branch, political factions, paramilitary groups, the military, or the police can and do act

with impunity in harassing, torturing, and murdering their political opponents and in suppressing dissent on the part of individuals or vulnerable minorities. Where civilian and military authorities arbitrarily deprive individuals of their basic rights, a climate of fear prevails in which citizens neither exercise their rights nor use the courts when their rights have been violated.

How then does a donor decide if a country might be receptive to judicial reform and thus warrant investment in strengthening ROL? Results of country studies conducted for this assessment suggest that the judicial environment frequently appears quite receptive to technical interventions. Judges and court staff are usually interested in securing technical training and acquiring the latest technology, such as computers for use in managing case tracking, personnel, and budgets. However, the studies also suggest that, in the absence of political commitment, such interventions may have little impact on improving judicial performance.

Examples from Sri Lanka and the Philippines suggest that, without reforming dysfunctional institutional processes and perverse organizational incentives, *changes in technology alone may yield only marginal improvements in judicial performance.* In Sri Lanka the effective use of new computer technology first required a redefining of the role of the clerical staff in the Supreme Court and removal of their power and control over caseload management. In the Philippines a project for new computerized tracking systems did not fulfill its intended purpose of improving the prosecutorial function. More fundamental structural changes

would have been required to improve performance—changes that frequently are resisted by vested interests who benefit from perpetuating the status quo.

Resistance to structural change in the courts is particularly unyielding where *rent seeking opportunities* are endangered. Inefficiencies in court procedures and management often translate into higher *transaction costs* for litigants and produce income benefits for court personnel in the form of legal or illegal fees. The power to delay case processing in particular provides judges or court staff with considerable leverage in exacting rent from litigants or parties who might have an interest in prolonging or expediting a case.

Opportunities to reconfigure structures and incentives to make the judiciary more vital and effective are not determined solely by the inclinations of the judicial system. Rather, the larger sociopolitical environment within which the judiciary is embedded can also impede or abet efforts at court and legal reform. In particular, judicial reforms can be more easily initiated and consummated where pressures for reform emanate from within the political elite or from constituencies in society at large.

In light of these observations, what indicators might be helpful in judging whether a country's environment makes it a good candidate for ROL investments? Table 1 includes criteria drawn from the case studies for making such judgments. The table ranks the extent to which each criterion was present in each of the countries studied.⁴

The first row of the table identifies potential *sources of support within the political elite*, that is, from within the executive branch (generally the Ministry of Justice but also the senior political officeholders in general), the court system, or the legislature. If party systems are well established, the leaders of the political opposition would be included as sources as well.

In many instances, there may be little support and perhaps even opposition from components of the political elite. However, as indicated in the second row of the table, there may be potentially important impulses and proclivities emanating from *reformist constituencies* in the wider civil society, such as bar associations, business groups, and coalitions of NGOs.

The third row refers to the courts' *level of autonomy* from the political system. Reformist measures probably have little chance of success where the executive branch, political parties, or military or police can manipulate the justice system for their own partisan or institutional interests.

The fourth row is a reminder that endemic and pervasive *judicial corruption* can act as a formidable deterrent to reform. As indicated in the fifth row, *freedom of speech*, especially through the media and use of polling, is critically important for allowing issues of judicial performance to be aired in public. Without public discourse, societal pressures for reform are likely to remain embryonic at best. Few countries will score favorably on all of these measures. Donors must therefore consider whether they can bring into play sufficient resources and leverage to compensate for inadequacies in one or more criteria.

This leads to the sixth criterion, *donor leverage and influence*, which differs from the first five in that it is essentially a function of donor orientation rather than a characteristic of the host country environment. Accordingly, the topic warrants slightly extended discussion.

Donor leverage and influence comprises several somewhat overlapping elements:

- *Conditionality* can move judicial reform issues higher on the political agenda of a host government if support for the judicial program is linked to

⁴ These rankings summarize CDIE's analyses of the judicial environment and scope for reform presented in the individual country studies.

Table 1. Criteria for Supporting Rule of Law Programs

	Argentina	Colombia	Honduras	Philippines	Sri Lanka	Uruguay
Reformist political elites (e.g., executive—especially Ministry of Justice—the courts, the legislature)	Low	High	Low	Low	Low	High
Reformist constituencies (e.g., bar associations, business associations, NGOs)	Medium	Medium	Low	High	Medium	High
Level of judicial independence (from the executive branch, political parties, military, or police)	Low	High	Low	Medium	High	High
Level of judicial probity	Medium	Low	Medium	Low	Medium	High
Freedom of speech (e.g., free media, opinion polling)	High	High	Medium	High	Low	High
Donor leverage and influence (e.g., conditionality, resources, convergence of agendas, policy dialogue)	Medium	Medium	Medium	Low	Low	Low

Note: Low, medium, and high indicate the extent to which a given criterion was present.

specific performance criteria (or better yet if more ample program assistance in other sectors is made contingent on judicial reform).

- The levels of *donor resources committed* can have similar effects, although high levels may result in an ROL program for which ownership lies more with the donor in fact than with the host country—as appears to have been true in Honduras.
- A *convergence of policy objectives* between the host country government and donor can have powerful effects in harnessing the energies of both parties to the cause of ROL reform, as happened in Colombia.

- Although its vigor will depend on how high ROL is on the U.S. bilateral policy agenda, *policy dialogue* with the host country government can assist materially in concentrating the government's attention on judicial reform.

As evident in Table 1, only Uruguay scored high on the five host-country-related criteria, which meant in effect that the sixth criterion—donor leverage and influence—did not have to be called into play. Conditions were already very receptive to a USAID initiative in judicial development. The other countries present a mosaic, scoring variously higher or lower on specific criteria, with Colombia, for example, being relatively well positioned to under-

take judicial reform and Honduras being considerably less favorably situated.

At the outset, then, it can be predicted that some countries will be found more appropriate than others for ROL programs. Still, where the first five

criteria shown in Table 1 do not present a promising picture, it may be possible to adjust the environment through adroit use of donor leverage and influence. But where these five criteria score too low, even the most heroic donor efforts may not be redemptive.



4

Crafting ROL Program Strategies

If there is a need for strengthening ROL in a particular country and the institutional and political environments are relatively favorable to donor investments in this area, how then does one develop an ROL program to support this goal? The analytical tree in Figure 1 outlines a series of steps for selecting and combining ROL country development strategies as part of overall ROL programs. The design of the analytical tree evolved from an analysis of the six country studies.

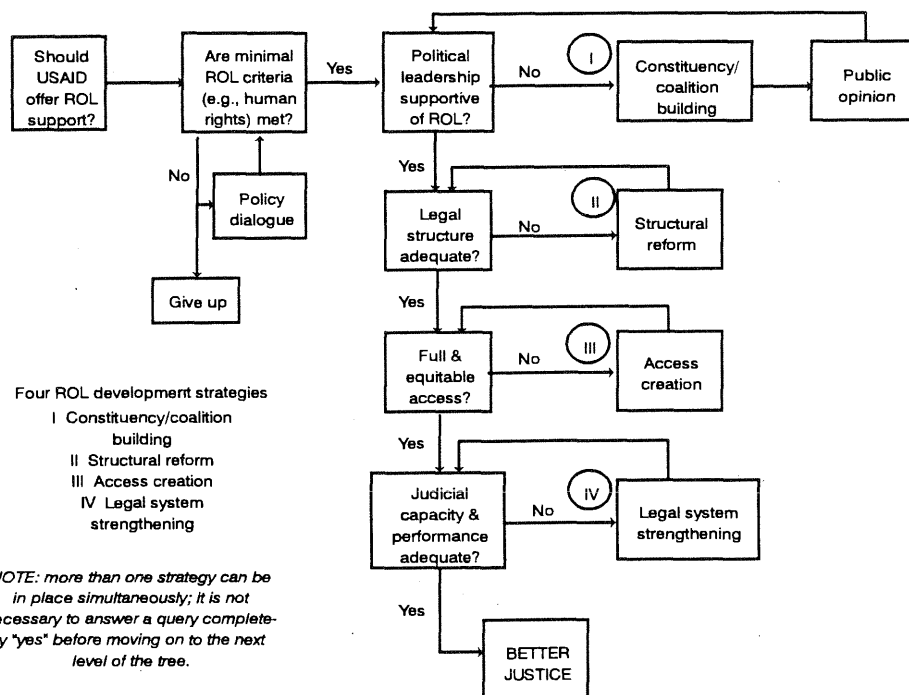
The decision process starts with the question, Should USAID offer ROL support? That is, *Does the state meet the minimal criteria for even contemplating an ROL effort?* In particular, Are basic standards of human rights in place? This criterion would have to be a precondition for any ROL development assistance. The use of torture as state policy, for example, would clearly indicate that a country is inappropriate for ROL support, as would the essential absence of the writ of *habeas corpus* or its procedural equivalent. Some justice systems are just so corrupt there is in effect no rule of law, and attempting to improve such systems before basic minimal integrity is established would be senseless.

Policy dialogue may induce a host country government to establish basic conditions for ROL support, but the tools of development diplomacy are not always effective. The only alternative would be abandoning ROL efforts in the country as shown in the “give up” box in the analytical tree.

If a donor determines that a country meets the minimal conditions and decides to engage in an ROL effort, its attention should then shift to the first major ROL question: *Is host country political leadership supportive of ROL?* If support is adequate, the donor should consider the next major question in the sequence: *Is the legal structure adequate?* If so, the third and fourth important queries are asked: *Is there full and equitable access to the justice system?* and *Is the state’s capacity and performance adequate in operating the justice system?*

If the answer to any of the four questions in the center column of the analytical tree is “no,” the process moves to the right. Here the boxes indicate *four different ROL strategies* that can be used to remedy deficiencies. Thus if political leadership is judged to be insufficiently supportive of ROL, then the appropriate strategy would be constituency and

Figure 1
An Analytical Tree for Supporting Rule of Law Development



coalition building. Similarly, if no adequate legal structure exists, then a structural reform would be appropriate, and so on, down through the tree.⁵

Three things must be emphasized at this point. First, it must be stated emphatically that the analytical-tree model depicted in Figure 1 is *inherently a simplification of reality*, as is any model. The basic

⁵ Choosing the exact nomenclature for the terms in the analytical tree proved a difficult task, particularly for strategy IV. "Judicial capacity" is meant to include the whole range of activities provided by the state in the legal sector: the judiciary itself (e.g., courts, judges, and record keeping); the justice ministry or its equivalent (e.g., prosecutors, investigators, and policy makers); and enforcement machinery such as police if it is not housed within the justice ministry. Strategy IV itself—"legal system strengthening"—refers to ROL development activities designed to improve judicial capacity. These are largely what are known as "institution building" efforts, but they do not include all ROL "institution building" activity (e.g., support for alternative dispute resolution [ADR] mechanisms under Strategy III). Nor are all the enterprises gathered under the "legal system strengthening" heading necessarily state activities (law schools and think tanks, for instance, are often found in the private sector). Strategy IV, then, aims to improve public sector judicial capacity, but it can support non-public activities in doing so.

purpose of models such as this one is to facilitate concentration on the crucial elements of a process by simplifying it to its essential core. The price of doing so, of course, is to eliminate the wealth of detail and the accuracy that characterize a full depiction of the process in question. A model can be expanded, to be sure, and the more it is expanded, the closer it approaches reality. But at the same time the focus on critical factors becomes increasingly fuzzy and even confusing as the subtleties of the minor branches take on more visibility.

This kind of trade-off can be appreciated through a glance at the much more complex analytical tree offered in Figure 1 of the appendix, which provides considerably more detail, but at the cost of clear and direct delineation of the key elements in ROL decision-making. For these reasons, we use the simpler figure in this section, fleshing out the main aspects of the successive steps through discussion in the text rather than yielding to the temptations offered by computer software graphics packages to construct ever more complex diagrams.

Second, it should be understood that the analytical tree in Figure 1 is *an analytical construct meant to inform decision-making, not to determine it in a rigidly sequential manner*. It is not meant to imply or require that any given step should be completely satisfied before moving to the next one. Indeed, rarely if ever will the answer to any of the questions in Figure 1 be an emphatic "yes" or "no." For example, when the Asia Foundation's effort in ROL support began in the Philippines during the mid-1980s, there was very little interest at the upper levels (see question in analytical tree concerning political leadership). Yet even in these inauspicious circumstances, the Government was able to introduce a basic change in trial procedures from a "piecemeal" basis to a "continuous trial" approach. Although the reform encountered much resistance and proved to be considerably less than an unqualified success, it did make some progress in improving the justice system.

Similarly in Uruguay, where a broad consensus existed among the political elite in favor of structural reform, there was nonetheless opposition from within both bench and bar stemming from concern that new oral trial procedures would be too cumbersome and time consuming. In summary, the *compo-*

sition of the answer to each successive question—that is, the extent to which the answer to the question is more affirmative than negative—should determine whether to pursue a given strategy (move to the right in the analytical tree), to proceed to the next strategy (descend the analytical tree), or to undertake some combination of both approaches. In sum, the underlying idea of the analytical tree is *to guide thinking in ROL programming, not to provide a blueprint to structure ROL projects*.

Third, there is the question of how robust the analytical tree approach is, how tolerant of the often widely differing conditions that are found in various countries. The cases are admittedly limited to six countries and two regions, but within this sample it has been possible to survey a wide variety of ROL program environments, as is shown in the appendix to this report. Table 1 of the appendix indicates the scope of ROL assistance modalities analyzed in this review, which range from a USAID stand-alone project to several types of intermediary (including the United Nations Development Programme) and Ford Foundation efforts (which are quite independent of USAID activity). Table 2 in the appendix shows the scale of ROL programs, which ranges from relatively large projects in Colombia and Honduras to a small series of grants in Uruguay. And finally, Table 3 in the appendix presents the variety in income and human development indicators across the six countries, as well as political freedom ratings and legal systems. Surely there are ROL programs and country settings that fall outside the range covered here, but the range surveyed is broad enough to encompass the parameters of most legal systems.

The fruit of the analytical tree approach is the ROL goal of better justice (see Figure 1). The definition of "justice" has of course been controversial in Western culture at least since Plato's *Republic*, and it has a long history of controversy in other cultural settings as well (see, for example, Steinberg 1992). For purposes of this assessment, however, "better justice" lies in a justice system characterized by

- *Legitimacy* in the perception of a country's citizens
- *Accountability* to the citizenry—a process dependent on *freedom of speech* to allow public

attention and debate to focus on lapses in the justice system

- Constant attention to *due process*, particularly in the area of *human rights*
- *Autonomy* from control, manipulation, or interference from other branches of the state or other elements in the society
- *Equity* or fairness for all citizens in the justice it provides
- *Effectiveness* in using resources to provide a high quality of justice

The characteristics of the analytical tree strategies are depicted in more detail in Table 2. Eight parameters of the four strategies are compared in the rows of the table; country examples are listed in the last row.

Row 1, *supply or demand strategy*, indicates whether the major emphasis of the strategy is on creating a greater supply of judicial services or generating greater public demand and accessibility to such services. Thus, strategies I and III focus on demand for judicial reforms and services, whereas strategies II and IV concern their supply. The strategies depicted as supply- or demand-oriented can also be thought of as *either more technical or more political* in their thrust. Strategy IV in particular, and strategy II to some extent, often resemble traditional donor approaches in their focus on technology transfer: proven practices and technologies are transplanted to new settings, often with little conscious attention to the political aspects involved.

Strategy I and much of strategy III are essentially political: donors are supporting efforts to change important political aspects of the host country environment. That is, strategy IV encourages donors to "think bureaucratically," whereas strategy I recommends "thinking politically" in pursuing ROL development efforts. Indeed, a central argument in this paper is that donors, long accustomed to thinking bureaucratically, should learn to think more politically in designing and implementing ROL programs.

Tracing strategy I through the remaining rows (2-7) will illustrate the utility of the table. Row 2 lays out *major development problem(s)* that each

strategy seeks to address. Strategy I addresses the challenge of insufficient political will for judicial reform, and strategy II takes on structural deficiencies in the justice system that are too severe to be remedied through traditional institution-building project efforts. By focusing on development problems to help guide programming, the decision-tree approach facilitates ROL planning to address specific problem areas.

The *longer term objective* (Row 3) of strategy I is to produce sustainable political commitment for the judicial system. The *intermediate objective* (Row 4) is to foster stronger public backing of the judicial system, and the *shorter term objective* (Row 5) is to generate greater public pressure on the political elite for reform.

Some possible *program activities* are listed in Row 6 that could be used to support the four strategies. For example, candidate program elements for strategy I could include cultivating coalitions of key political and bureaucratic elites, supporting media reporting on the judicial system, and strengthening legal advocacy NGOs seeking to pressure the political elite for judicial reform. The advocacy activity could include, for example, an anticorruption campaign or a "court watch" effort, as was observed in the Philippines.

Row 7 offers some *performance indicators* that might be used to measure program progress, and Row 8 indicates some *problems* that each of the strategies will likely encounter during implementation. For example, strategy I may face the test of sustaining public interest in judicial reform and the problem of holding together coalitions that begin to divide over fractious policy issues.

Finally, in Row 9, the table offers *prominent examples* from study countries where the strategy has been used. Thus in Colombia, Honduras, and Uruguay the legal system strengthening strategy has been emphasized, whereas the Philippines and Sri Lanka provide examples of the access creation strategy.

Although one strategy may dominate donor ROL programming in a particular country, elements of the other strategies may also find support there. Furthermore, evidence from the six countries indi-

Table 2. Characteristics of Rule of Law System Development Strategies

	I. CONSTITUENCY AND COALITION BUILDING	II. STRUCTURAL REFORM	III. ACCESS CREATION	IV. LEGAL SYSTEM STRENGTHENING
1. Supply or demand strategy	<ul style="list-style-type: none"> • Demand 	<ul style="list-style-type: none"> • Supply 	<ul style="list-style-type: none"> • Demand 	<ul style="list-style-type: none"> • Supply
2. Development problem(s)	<ul style="list-style-type: none"> • Lack of political will to undertake judicial system reform 	<ul style="list-style-type: none"> • Structural deficiencies beyond scope of system building 	<ul style="list-style-type: none"> • Systemic exclusion of non-elites • Suppression of human rights (e.g., women's rights, minorities' rights) 	<ul style="list-style-type: none"> • A justice system severely weakened by: <ul style="list-style-type: none"> ◊ inefficiency ◊ incompetence ◊ inadequate resources
3. Longer term objectives	<ul style="list-style-type: none"> • Sustainable political commitment in support of the judicial system 	<ul style="list-style-type: none"> • A more accountable governance system 	<ul style="list-style-type: none"> • A legal system that promotes greater social and economic equity 	<ul style="list-style-type: none"> • A more effective legal system
4. Intermediate objectives	<ul style="list-style-type: none"> • Widespread public support for the judicial system 	<ul style="list-style-type: none"> • An autonomous and more effective judicial system 	<ul style="list-style-type: none"> • Empowerment of disadvantaged groups 	<ul style="list-style-type: none"> • An efficient legal system
5. Shorter term objectives	<ul style="list-style-type: none"> • Public pressure on political leadership to undertake judicial reform 	<ul style="list-style-type: none"> • New legislation, regulation, court procedures (rule changing) • New adjudication structures • Constitutional restructuring 	<ul style="list-style-type: none"> • Access to legal system for: <ul style="list-style-type: none"> ◊ citizens against the state ◊ citizens against each other • Redress for injustices and human rights abuses 	<ul style="list-style-type: none"> • More qualified legal personnel • Enhanced legal resources • Improved court administration
6. Program elements	<ul style="list-style-type: none"> • Coalition building among key elites • Support for media: <ul style="list-style-type: none"> ◊ judicial reporting ◊ investigative journalism • Support for NGOs: <ul style="list-style-type: none"> ◊ mobilize constituencies for change ◊ lobbying ◊ affect public opinion • Anticorruption efforts • Responsible lawyers' community 	<ul style="list-style-type: none"> • Autonomous judicial budget • Restructured judicial review • New judicial processes (e.g., oral procedures, criminal procedure codes) • ADR mechanisms • Constitutional reform • Establish career service(s) 	<ul style="list-style-type: none"> • NGO advocacy for disadvantaged • Paralegal training • ADR • Developmental legal assistance • Litigation aid • Media monitoring • Legal literacy 	<ul style="list-style-type: none"> • Professionalization of courts, police, prosecutors • Human rights/ethics training • Court modernization • Increased court budgets • Law school curricula, training for judges and lawyers • Supervision of lower courts • Legal think tanks
7. Performance indicators	<ul style="list-style-type: none"> • Elite dialogue and common agenda emerging on judicial reform • Public opinion polls favoring legal system reform • Public attention to corruption • NGO advocacy and reformist coalitions emerging 	<ul style="list-style-type: none"> • New institutional rules improving justice system effectiveness • ADR mechanisms functioning effectively • Constitutional changes positively affecting legal system 	<ul style="list-style-type: none"> • Justice system more responsive and accountable to disadvantaged groups • Decreased abuses • Greater equity for disadvantaged • NGO recruitment into government 	<ul style="list-style-type: none"> • Improved case processing • Better investigation/prosecution • Enhanced legal education • Greater probity and standards • Enhanced legitimacy (surveys) • Advances in legal knowledge
8. Problems and issues	<ul style="list-style-type: none"> • Flagging constituent support • Competition fragmenting coalitions for change 	<ul style="list-style-type: none"> • Reforms insufficient to transform judiciary • Reforms constrained by: <ul style="list-style-type: none"> ◊ limited political will ◊ weak constituencies 	<ul style="list-style-type: none"> • Sustainability (resources and operations) • Fragmented constituencies • Elite opposition • Limited coverage and replicability 	<ul style="list-style-type: none"> • Manipulation by dominant elites • Inadequate elite support • Little cultural resonance for reform • Opposition from vested interests • Pervasive corruption • System building insufficient; stronger measures needed
9. Prominent examples	<ul style="list-style-type: none"> • Argentina, Colombia, Philippines 	<ul style="list-style-type: none"> • Colombia 	<ul style="list-style-type: none"> • Philippines, Sri Lanka 	<ul style="list-style-type: none"> • Colombia, Honduras, Uruguay

Note: ADR = alternative dispute resolution.

cates that emphasis on any one strategy may shift over time to emphasis on another strategy.

Changes in strategic emphasis may come in response to success or failure in pursuing a particular strategy. The experience in the countries studied suggests that proper sequencing of strategies is important. Success was achieved in Colombia with an initial focus on coalition building (demand) followed by investments in structural reform and legal system strengthening (supply). In the Philippines an unsuccessful effort in supply side strategies has been replaced by a demand driven approach. These lessons on sequencing are reflected in the analytical tree.

A change may also be a product of new opportunities in the judicial system opening the door to new investments. In Uruguay, for example, the Government launched judicial reform with a fundamental change in trial procedures (strategy II), which provided an opportunity for USAID assistance in legal system strengthening (strategy IV).

There is, as noted in Section 2, an emerging *fourth generation* of legal development programs, which will require a more systemic perspective on legal development, embracing demand-creating as well as supply-providing activities and incorporating donor political support as well as

the more traditional technical support that has tended to characterize USAID programs in the past. This wider view is required in order to comprehend the full range of strategies being pursued by donors and to extract the lessons to be gleaned from their experience.

ROL programs in the countries studied began in the early and mid-1980s. The ROL program in Honduras—the Administration of Justice program⁶—was designed in 1987 but its implementation began in 1990. Colombia's ROL program started in 1986, Argentina's in 1989, and Uruguay's in 1990. As indicated in appendix Table 2, considerable variation exists in the magnitude of USAID funding devoted to each of these country endeavors.

In Sri Lanka and the Philippines, the Asia Foundation has a longer history of support for ROL activities than does USAID. The Foundation's ROL efforts in Sri Lanka started in the early 1980s with modest funding but expanded considerably in the late 1980s, when annual funding moved above \$200,000. In 1991, USAID provided an additional \$241,000 to support the Foundation's ROL activities. In the Philippines, both the Ford and Asia Foundations have been active in the legal sector for some time, with USAID only recently beginning to target funds directly in this area.

⁶ ROL programs in the Latin America and Caribbean region are generally referred to as Administration of Justice activities, but this term is not used in other regions. Initially this assessment referred to USAID's global effort in the justice sector as Legal Systems Development, but USAID's new democracy strategy paper calls these endeavors "rule of law," which is the term used in this report.



5

Constituency and Coalition Building Strategies

Lessons Learned

- A strong civil society is an effective base for launching efforts to mobilize constituencies to support ROL development.
- There are few examples of bar associations serving as major sources for reform initiatives.
- The commercial sector can be an important reform constituency.
- Although NGO-based coalitions may prove difficult to build, they can form a strong force for legal reform.
- Free and effective media are needed to support constituency building.
- Reliable court statistics are needed to inform public debate on ROL.
- Opinion surveys are invaluable for assessing public demand for judicial reform.
- USAID has more to learn about crafting coalition building strategies.

The Challenge of Mobilizing Demand

Although constituency and coalition building is the first of the four ROL strategies discussed in the previous section—and was used eventually in five of the six countries studied—it was carried out as

the *first* ROL strategy in only one case—Colombia (see Table 3). Projects in Argentina and the Philippines adopted constituency and coalition building as a fallback strategy only after other approaches proved unworkable. In Honduras and Sri Lanka some elements of the strategy appeared during the course of the ROL enterprise, but they were not major parts of the effort to mold constituencies for reform. The argument made here—that the constituency and coalition building strategy should be considered first even if it is not always tried at the outset—constitutes one of the study's major conclusions and is explored at several points in the report.

Why was constituency and coalition building not considered as the initial ROL strategy in most of the sample countries? The late 1980s were a time of great optimism for democracy as a way of political life. Argentina, Honduras, the Philippines, and Uruguay were just emerging from periods of sustained dictatorship or authoritarian government with legacies of serious human rights abuses and with judiciaries whose independence had long been compromised. A newly elected political leadership in each country seemed to manifest a renewed interest in democratization and in energizing enervated judicial systems. It was a time of great hope for ROL development.

The political leadership in these four countries were willing to begin structural reform (strategy II in the analytical tree and in Table 2), and accordingly donors concluded that sufficient political will was in place to support serious ROL development. Specifically, donors believed it would be feasible to

Table 3. Rule of Law Development Strategies in Six Country Environments

Strategy	Argentina	Colombia	Honduras	Philippines	Sri Lanka	Uruguay
Constituency & Coalition building	<ul style="list-style-type: none"> • <i>Poder Ciudadano</i> & media/corruption focus • <i>Conciencia</i> • Opinion polling • Link w/ province of Buenos Aires courts • <i>Fundación para la Modernización del Estado</i> and Arthur Anderson study 	<ul style="list-style-type: none"> • <i>Fundación para la Educación Superior</i> and key policymakers 	<ul style="list-style-type: none"> • National Judicial Reform Commission 	<ul style="list-style-type: none"> • Media—investigative reporting • Mobilizing/advocacy for <i>marginal groups</i>: women, indigenous peoples, landless farmers, urban poor • <i>elites</i>: business, bar associations • Umbrella NGOs in local governments • Opinion polling 	<ul style="list-style-type: none"> • Bar association 	[not needed]
Structural reform	<ul style="list-style-type: none"> • Oral procedures (penal) • Judicial appointments • ADR 	<ul style="list-style-type: none"> • Constitutional redrafting ◊ <i>Fiscalía</i> ◊ Public order courts • ADR 	<ul style="list-style-type: none"> • Career judicial service 	<ul style="list-style-type: none"> • Continuous trials • Judicial appointments • Constitutional human rights guarantees • ADR 	<ul style="list-style-type: none"> • Constitutional reform • ADR 	<ul style="list-style-type: none"> • Oral procedures (civil) • Radical expansion of judiciary • Judicial appointment • ADR
Access creation	<ul style="list-style-type: none"> • Pilot legal aid & mediation • Mediation expansion • Training for public defenders/mediators 	<ul style="list-style-type: none"> • Conciliation mechanisms 	<ul style="list-style-type: none"> • Training for public defenders 	<ul style="list-style-type: none"> • Paralegals • Legal literacy • Legal aid & legal internships • Commercial ADR • Barangay ADR 	<ul style="list-style-type: none"> • Legal services ◊ legal aid • Mediation councils • Enhanced writs • ADR 	<ul style="list-style-type: none"> • Commercial ADR
Legal system strengthening	<ul style="list-style-type: none"> • Judicial school • Federal court studies • CEJURA* judicial center • Provincial court for Buenos Aires 	<ul style="list-style-type: none"> • Public order courts • Training for ◊ investigators • Court modernization (including statistics) • <i>Procuraduría & Fiscalía</i> • Law libraries • Analytical research 	<ul style="list-style-type: none"> • Recruitment & training for ◊ prosecutors ◊ lawyers ◊ judges • Court modernization • Budget autonomy 	<ul style="list-style-type: none"> • Training for ◊ judges ◊ lawyers • Law school aid • Law libraries • Statistical research 	<ul style="list-style-type: none"> • Law school curricula • Legal think tanks 	<ul style="list-style-type: none"> • Training for ◊ judges ◊ court administrators • Statistics/MIS • Administrative reform

Note: Shaded cells indicate initial strategy followed. MIS is management information systems.

* National Center for Provincial Courts.

move directly to legal system strengthening, which in this report is discussed as strategy IV but which donors in the late 1980s tended to think of as the logical follow-on to structural reform. In short, an initial willingness to undertake structural reform was considered adequate evidence that a host country government was committed to ROL development. It was therefore thought appropriate to move into the public sector institution building approaches that have long characterized so much of international donor activity. More problematic and more obviously "political" approaches, such as constituency building, did not seem suitable.⁷ Or, given the long experience of donors in institution building, perhaps such unconventional approaches simply did not occur to planners accustomed to thinking bureaucratically rather than politically.

As things turned out, however, in only one of the four cases—Uruguay—was there sufficient political will to proceed directly with a legal system strengthening strategy. In Argentina and the Philippines, legal system strengthening efforts did not fare well; donors in these two countries adapted to program reverses by shifting to constituency and coalition building approaches that might have been better adopted at the outset. In Honduras an emphasis was placed on coalition building through forming and supporting a quasi-governmental National Judicial Reform Commission (NJRC). However, the commission has yet to attain the stature and influence necessary for exercising strong leadership in support of reform. With hindsight, it can be surmised that the best course probably would have been to couple this coalition strategy with investments in constituency building.

The other two countries—Colombia and Sri Lanka—lacked the ebullience of newly restored democracy that characterized the first four during the late 1980s. In fact, the political environment in both countries appeared to be taking a serious turn for the worse. Colombia by the mid-1980s was under siege by guerilla bands and narcotics traffickers determined to eliminate all opposition to their activities. Sri Lanka was caught in an escalating cycle of violence and atrocity involving militants from the Tamil minority and extremist Sinhalese groups. In neither country could the assumption be made that sufficient political will was present to begin ROL development with a legal system strengthening strategy. Thus from the outset it was necessary to try other approaches to ROL development.

Constituency and Coalition Building in Six Countries

The *Philippines* experience illustrates most clearly the evolutionary transition of strategies. The new democratic Government under President Corazon Aquino did undertake some structural reforms (strategy II), and the situation seemed propitious to support a legal system strengthening strategy. But by the beginning of the 1990s it had become clear to the Asia and Ford Foundations that the legal system strengthening activities they had launched earlier were not promoting significant change in the legal system.⁸ Support for efforts such as training

⁷ In the Latin America context the initial USAID emphasis on legal system strengthening and structural reform strategies reflected not only a relatively high degree of confidence in host government commitments to ROL, but also a concern that mobilizing citizen pressure groups for reform might inflame national sentiments over U.S. involvement in a sensitive political area. Similarly, in some instances there was apprehension, particularly in the cold war era, that encouraging grass-roots demands for reform might overwhelm fragile democratic institutions and open the way to the ascendance of antidemocratic political movements from either the left or the right.

⁸ We wish to acknowledge here the pioneering role of the Ford Foundation and in particular the Asia Foundation in developing the constituency building approach. Their efforts and articulation of these efforts have been instrumental in facilitating our understanding of this strategy and its role in ROL development. Especially valuable have been George (1991) and Jensen (1993) on the Philippines and Hein (1993) more generally.

for judges, expansion of law libraries, or aid for law schools did not seem to be yielding positive results in a legal system with little political will to change. A judicial structure that had for many decades served to reinforce oligarchical control of society and to exclude large classes of people from access to the justice system—and that had arguably become as corrupt as the rest of the polity—was not going to change so easily.

Accordingly, in the late 1980s and early 1990s, the Asia and Ford Foundations decided to focus on mobilizing new constituencies to pressure the political leadership to favor ROL development. Assistance was provided for several kinds of activities in constituency and coalition building (see Table 3) including

- *Investigative journalism and enhanced legal reporting* to make the justice system more transparent to the citizenry so that corruption and malfeasance would become more difficult to conceal.
- *People's advocacy NGOs* (which already existed to mobilize and promote the cause of various marginalized groups) to advance the legal components in their programs (e.g., rights to ancestral lands for indigenous peoples, leasehold titles for sugarcane sharecroppers, land purchase schemes for urban squatters, a rape law revision).

- *Elite advocacy NGOs* to publicly monitor the court system and promote ADR mechanisms in commercial law.

- *Umbrella NGO coordinating groups* to support the use of a new government provision allocating representation to NGOs on municipal bodies to further a legal reform agenda at the local level. (This particular approach was pursued by USAID rather than by the two foundations).

- *Public opinion surveys* to provide empirical evidence of low public esteem for the judicial system.

In *Argentina*, matters were rather less distinct than in the Philippines. Here also a new democratic regime showed itself supportive of a degree of structural reform by instituting oral trial procedures in the federal criminal courts and a new system for judicial appointments. Assuming that these reforms demonstrated significant government commitment to ROL development, USAID began legal system strengthening activities (as shown in the last row of Table 3). In particular, USAID supported a national judicial school that would meet the training needs of the federal court system.⁹ Unfortunately, political and personal differences on the national Supreme Court (which had to approve the project) proved too intense¹⁰ to launch the school, and, in the wake of this conflict, other planned activities proved ineffective as well. Federal court studies

⁹ In Argentina's federal system, the courts include a three-tiered structure culminating in a Supreme Court of the Nation, as well as the ordinary courts for the federal capital of Buenos Aires. The entire federal court organization is separate from the provincial court systems, where each province has its own court setup, often with significant differences from one province to the next. This arrangement is similar in many ways to that found in the United States. Of the six countries studied for this report, only Argentina has a federal system of governance. The others all have one or another form of unitary governmental structure.

¹⁰ Conflict within the Supreme Court was to increase over time, making any commitment to significant ROL development even more problematic. While the CDIE team was in Argentina, a major scandal erupted within the court over a decision that was first missing and then mysteriously turned up doctored. Supreme Court justices publicly accused one another of complicity in the case, and various allegations of outrageous behavior were lodged in the local media. There was much public interest in the case, fueled by television, newspaper, and magazine coverage. One daily newspaper ran successive sensational front-page headlines accompanied by long and detailed stories on the "*Escándalo en la Corte*" for more than a week after the affair broke open (*Página 12*, 30 September–10 October 1993).

were never implemented (or even seriously considered) and a proposed judicial studies center never began to function.

It became evident in Argentina over time that there was neither sufficient will nor coherence at the top of the federal judicial system for undertaking reform or even for devoting serious energy to considering it. Nor was national political leadership outside the court under President Carlos Menem seized with the importance of reforming the judiciary.

As in the Philippines, the response in Argentina (in this case from USAID rather than from the Asia and Ford Foundations) was to shift to a *constituency and coalition building strategy*. This followup approach included several activities (see first row of Table 3):

- A public interest NGO (*Poder Ciudadano*) to publicize corruption issues and integrity in government through the media and other channels
- Another NGO (*Conciencia*) to implement a civic education campaign largely among the middle classes stressing responsiveness in government
- A corporate-oriented NGO to undertake a comprehensive analysis of judicial reform needs
- Public opinion surveys to provide empirical evidence of the low esteem in which the citizenry held the justice system

The options followed here were like those pursued in the Philippines, with a similar concentration on media coverage and corruption, elite mobilization efforts, and public opinion surveys.

Whereas the Agency's Argentina ROL strategy moved toward emphasizing constituency building, the legal system strengthening and structural re-

form approaches took on a different configuration. Argentina's federal system offered an opportunity for ROL assistance that was absent in the more unitary Philippines, because in Argentina legal system strengthening strategies that failed at the federal level could be tried at the provincial level. Thus when USAID found a receptive audience at the Supreme Court of Buenos Aires Province,¹¹ it could begin working on some of the same activities that had found little enthusiasm at a higher level—in particular the judicial school concept. Some of the constituency building endeavors, such as civic education and media reporting, were also replicated at the provincial level. Argentina's federal system thus encouraged a two-track approach to ROL development that was not possible in the Philippines.

Colombia offers a third variant on the constituency and coalition building approach. In this case, constituencies for ROL reform were already present in a country so beset by violence that there was widespread agreement on the need for drastic change. USAID's role was thus not to support the mobilization of constituencies but to nurture the building of a coalition to bring existing constituencies together. This was done largely through the establishment of a management committee (*Comité Asesor*) within the intermediary NGO (*La Fundación para la Educación Superior*) selected to implement the ROL program in Colombia. The committee included key ROL players from the judiciary, the Justice Ministry, and law schools in a neutral setting that fostered a new cooperation among agencies that had previously worked largely in isolation from each other.

In the other three countries, a somewhat less concerted emphasis was placed on constituency and coalition building. In *Honduras* an effort was made to build a coalition of elites through the NJRC whose members represented the government agen-

¹¹ In addition to being the name of the federal capital with a population of around 3 million people, Buenos Aires is also the name of the adjacent province, which contains about 10 million inhabitants and has its own capital city of La Plata. Much of the province's population is included in "Greater Buenos Aires," which denotes an urban area of roughly 11 million people. Altogether the picture is quite like that in the Washington metropolitan area, with a federal district surrounded by but not a part of the neighboring states.

cies involved in the judicial system. Although this commission has fostered some coordination among the USAID project activities, its conservative orientation has not led to innovative leadership. For example, initially there was a public awareness component in the USAID ROL project to inform citizens of their rights under the law and create a public constituency to press for improved judicial services. But NJRC persuaded USAID to postpone implementing this component until further improvements could be made in the courts to meet growing public demand for their services.

In the absence of public pressure, how resolutely the Honduran Government will hold to its judicial reform agenda is still unclear. The CDIE team found that many new career appointees in the judicial system felt that, without public pressure to support the career service, there would be a gradual reversion to the patronage system. In summary, what worked in Colombian coalition building has yet to succeed in the Honduran case, probably because the critical constituencies in Colombia were already energized to undertake serious judicial reforms. The election of Carlos Roberto Reina as president of Honduras in late 1993, with his human rights background, may augur well for bringing stronger government commitment to the judicial reform effort.

In *Sri Lanka*, except for a commitment to expanding a program for ADR, judicial reform issues have not ranked high on the Government's agenda. Consequently, the Asia Foundation and USAID have worked together to mobilize a constituency for reform, although their ROL work did not begin with this strategy. The constituency and coalition building effort in Sri Lanka is targeted primarily on *strengthening the bar association* as a professional resource for lawyers and as a forum for vetting reform issues.

Finally, in *Uruguay* it seemed clear that the political leadership was very much committed to legal reform at the outset. The democratic leadership that had emerged in the early 1980s had decided to make legal reform a centerpiece of its efforts to restore a democratic polity. It expanded the number of judges by about 30 percent and laid

the groundwork for introducing oral trial procedures into the traditional Uruguayan civil code system. Thus not only the constituencies for change but also an effective coalition for ROL development were in place.

In summary, the six cases reveal a variety of conditions that gave rise to a diversity of ROL strategies. In Uruguay an elite coalition autonomously exercised the political leadership needed to undertake judicial reform. USAID was then able to step in and support institution building work to implement that reform. In Colombia, where the constituencies for reform existed but had not yet formed a viable coalition, USAID has been instrumental in nurturing such a coalition. In the other four countries, constituencies to support judicial reform were at best incipient; certainly they were not ready to begin forming coalitions, so it became necessary for USAID and the Asia and Ford Foundations to support endeavors both to mobilize constituencies and forge coalitions among those constituencies. These observations are summarized in Table 4.

Lessons in Constituency and Coalition Building

What lessons can be learned about constituency building? Insights in this area must be tentative because in many cases constituency building as an ROL strategy is a relatively recent development. The first lesson is that *having a strong and vigorous civil society in place helps as a foundation for mobilizing constituency support*.

Because the Philippines is well known for its robust NGO environment, the ROL challenge was mostly to inspire active NGOs to take on new work. In Argentina a vibrant civil society had become well established between the restoration of democracy in 1983 and the beginnings of USAID assistance for ROL development toward the end of the decade. Again the task was to redirect energies already in use. But in both Honduras and Sri Lanka, civil society is much weaker, particularly in Honduras; constituency building therefore becomes more difficult.

Table 4. Effectiveness of Rule of Law Development Strategies in Six Countries

Strategy	Argentina	Colombia	Honduras	Philippines	Sri Lanka	Uruguay
Constituency/coalition building	Constituencies weak & fragmented in polarized & corrupt system; efforts underway	Constituencies already present, coalition forged w/ USAID effort	Constituencies & coalitions embryonic at best	Corruption rampant, but energetic constituency & coalition building in progress	Constituencies & coalitions weak & fragmented	Coalition for ROL development already in place
Structural reform	Restructuring not very effective w/o political will	Major restructuring undertaken	Uncertain prospects for positive results	Limited effectiveness	Little effort except in ADR	Restructuring commensurate with need
Access creation	Some progress	Some progress	Progress unclear	Some progress	Some progress	Progress unclear
Legal system strengthening	Some work feasible even w/o earlier steps fully in place	Efforts making headway, though set back by exogenous factors	Uncertain prospects for positive results	Little hope for positive results at present	Mixed success	Efforts highly effective

What sectors might be the most responsive to constituency building? Four stand out immediately: bar associations, the commercial sector, the NGO community, and the media. A review of the characteristics of these sectors in the six countries reveals a mixed picture regarding their potential contributions to judicial reform.

To many observers, host country *bar associations* would seem an important constituency to press for legal reform. For example, the Integrated Bar of the Philippines (IBP) has proposed referring all commercial cases to arbitration instead of to the courts to avoid the delays and corruption encumbering litigation in the courts. But IBP is the only example of such efforts on the part of bar associations in any of the six countries studied. Accordingly, a second lesson is that *other than in the Philippines, there are no case study examples of bar associations serving as major sources of reform initiatives.*

Bar associations have not been pacesetters for reform for several reasons. First, because members of the bar represent a diverse range of ideological

persuasions and interests, it is difficult (though as IBP demonstrates not impossible) to arrive at any organizational consensus on reform. Argentina is a case in point, where there are three bar associations in Buenos Aires, all with competing agendas.

Second, bar members frequently have vested interests in the current system; championing innovations might jeopardize their income-generating opportunities. Thus in Sri Lanka the bar was not an active proponent of mediation boards (although it did not actively oppose them). In the Philippines lawyers are complaining that the Government's introduction of continuous trials to expedite case processing is reducing their income.

Third, some bar associations, such as those in Argentina and Honduras, have been highly politicized, which has diverted their attention away from important reform issues. Finally, members of the bar have been reluctant to be personally associated with open discussions of reforms that might seem critical of the judiciary for fear that judges would become biased against them in future cases. Thus in Sri Lanka, Asia Foundation efforts to arrange bar-

bench conferences have not been very successful in raising issues and reform proposals because of the prevailing distrust between lawyers and judges. What the Foundation has successfully arranged, however, is a first-time systematic polling of lawyers' opinions about issues that could form a reform agenda.

Another potential constituency for legal reform is the *commercial sector*, where there is real incentive to press for property- and contract-rights enforcement as a cornerstone of an effective legal system. Here the country studies provide a mixed picture. In Honduras the business community has not actively promoted legal reform, largely because the more sizeable firms—with their political and economic clout—have not been inconvenienced by a weak legal system. In Sri Lanka large businesses avoid the courts at all costs and frequently use political connections to evade litigation. Thus in both countries the business community remains at the margin of the legal reform arena.

The situation is somewhat different in the Philippines, where in Manila the Makati Business Club, with assistance from the Asia Foundation, has started a "court watch" project. Observers attend Metro Manila courts to monitor and study court performance and report to the Supreme Court any violations of judicial ethics and procedure that they observe. The information gathered from these observations is published in the hope that it will stimulate reform and improvement.

The court watch project started in late 1992, and it is too early to know if it will move the courts to higher standards of efficiency and probity. Reports from several sources indicate that judges are altering their conduct because of the watch project and are ordering their staff to be on their best behavior. (The monitors are not known to the judges and there is no way of knowing when the monitors might be present in the court.)

In Argentina, the *Fundación para la Modernización del Estado* (FME, or Foundation for State Modernization), representing approximately 80 major national corporations, has actively pressed for state reforms. FME financed a study advocating radical restructuring of state administration and then lobbied for its recommendations (including

such reforms as steep payroll reductions in what had become over the years a vastly bloated public sector). FME is now backing a similar study of the judiciary, which has been supported by USAID. The report, being undertaken by Arthur Anderson Associates, is scheduled for publication in late 1993.

In Uruguay, the *Centro de Estudios de la Realidad Económica y Social* (CERES, or Center for Economic and Social Studies) is a think tank supported by the private sector, USAID, and other donors. CERES has undertaken a series of research projects on deregulation and market liberalization, including proposals for changes in commercial law.

In addition to the efforts of the domestic business constituencies to focus attention on judicial improvement, the foreign business sector has served as a constituency for reform. In the Philippines, where there has been a longstanding foreign investment sector particularly from the United States, the American Chamber of Commerce has been working with USAID and other private organizations to improve the adjudication of intellectual property rights cases. In Uruguay the Chamber of Commerce Uruguay-U.S.A. has been moving in a similar direction, although more cautiously.

A third lesson therefore is that *the commercial sector, whether foreign or domestic, can be a constituency for judicial reform*. It is not clear, however, whether such pressure can be translated effectively into legal improvements, because the commercial sector is not uniformly reformist. Countervailing forces may exist whose interests lie in maintaining the courts as they are, where litigants can be entwined in a labyrinth of delays and ambiguous procedures and where corruption, contradictory or unclear legal codes, and faulty judgments produce an environment of uncertainty. For domestic businesses profiting from a more closed economy, an inefficient and unreliable judicial system constitutes a useful barrier keeping out potential foreign and domestic competitors, whose investments would be at risk without adequate legal safeguards.

For example, in both Argentina and the Philippines in recent years, the business community has been quite divided. One faction presses to open markets to outside participation, to pursue export opportunities, and to create a level legal playing

field for all, while another faction prefers to continue with heavily regulated trade and protected internal markets, sees little promise in exports, and has become accustomed to dealing with an inefficient and corrupt legal sector. The former group has a strong incentive for legal reform, whereas the latter has very little. Conditions such as this explain why a USAID project in Sri Lanka, intended to build a coalition of business confederations into a broad-based lobbying group for commercial reform, faces a difficult challenge.

In addition to bar associations and commercial groups, yet another potential constituency for legal reform is that portion of the *NGO sector* engaged in legal aid and legal advocacy. Although the NGO community in many countries represents a rich and important resource for extending access to legal services, there are often several factors inhibiting its emergence as a major constituency for legal reform.

First, given their limited size, NGOs generally represent relatively small constituencies. Thus, even if they are vocal and active, individual NGOs exercise very little leverage on behalf of a reform agenda. Moreover, because of financial and management resource constraints, most NGOs have difficulty expanding their reach to include a larger constituency. For example, in Sri Lanka, Sarvodaya became overextended and had to undertake a major retrenchment to reduce its outreach programs.

Second, for several reasons NGOs frequently find it difficult to form coalitions to champion reform agendas. Constraints to collective action vary but focus largely on policy issues and leadership styles. In Sri Lanka, for example, women's rights NGOs were split over whether to liberalize the male-biased divorce laws in the direction of "no-fault" divorce. In the Philippines, some of the major legal-service and legal-advocacy NGOs were divided over whether they should act more independently or more collaboratively in working with government agencies on behalf of their constituents. The source of this conflict is the classical dilemma or trade-off between seeking more accommodative ties with state authorities and the concern that closer cooperation may lead to cooptation and compromised integrity.

Leadership styles can also impede the development of NGO coalitions. Many NGOs are personal expressions of dynamic leaders who, having founded an organization, are reluctant to share power with or subordinate their identity to a coalition involving other NGOs. Sri Lankan NGO activists repeatedly mentioned this as a constraint to forging ties.

Although problems in building NGO constituencies and coalitions can be discouraging, donors should not shy away from supporting such efforts. The power of a coalition in achieving basic reforms has been well demonstrated in the Philippines. For example, an NGO coalition representing the urban poor leveraged its influence in a vigorous lobbying campaign to win legislative support for programs in housing and basic services—programs that the Philippine Constitution has specified as rights of the urban poor. The coalition received help from a legal resource NGO (a recipient of Asia Foundation support) in drafting legislation that under heavy NGO pressure was adopted by the national legislature. A fourth lesson, then, is that *NGO-based coalitions can be a strong force for legal reform, but building such coalitions can prove difficult—even when (or perhaps especially when) vigorous NGOs are already at work in a given sector.*

A fifth lesson is that *free and effective media are needed for constituencies to build their base of support and to generate public pressure for legal reform.* In the absence of effective media, coalitions and constituencies advocating reform work largely in isolation and so are deprived of the opportunity to influence and mobilize public pressure. Media that are free and have the professional capacity to investigate and report on deficiencies in judicial performance and the legal system are generally a critical ingredient of the reform process.

In the three LDC case-study countries—the Philippines, Sri Lanka, and Honduras—government exercises direct or indirect control over television broadcasts and limits the broadcasting of reports that might reflect poorly on the legal system or highlight major social issues that touch on legal matters. The regulation of radio broadcasts is somewhat different. Strict controls on the content of radio broadcasting exist in Sri Lanka, but in Honduras and the Philippines radio stations, particularly

talk shows, have assumed an important role in allowing citizens to voice their opinions about government programs and services. In the Philippines some of the talk shows have been hosted by legal resource NGOs. Radio journalism is not without risks, however; more than 30 broadcast journalists have been killed in the Philippines during the last decade.

The print media are another matter. In the three LDC countries newspaper reporting has been short on substantive reporting and long on sensational or superficial journalism. In Honduras and Sri Lanka (as well as in the Philippines during the Marcos era), newspapers have been careful not to report on items that might reflect negatively on the government and particularly on more powerful public figures, because the government can ration or withhold newsprint or advertising. (The latter is particularly injurious where commercial advertisers are few.) And if these measures prove ineffective, intolerant governments can resort to intimidation or worse against offending journalists. All three countries have a history of this type of government behavior.

In addition to formal and informal limitations on effective reporting, many journalists simply lack the professional skills and resource base needed to undertake serious investigative reporting. In Sri Lanka the Asia Foundation is supporting the development of a university degree program in journalism, and in the Philippines the Foundation is assisting the Center for Investigative Journalism. The Center has sponsored investigative press reports and has been instrumental in exposing judicial malfeasance. One such investigation was instrumental in bringing about the early retirement of a Supreme Court justice.

In Argentina, Colombia, and Uruguay the press has considerably more freedom. These ADCs have essentially uninhibited print media, with judicial matters often commanding a higher proportion of

newspaper and newsweekly editorial space than in the United States. Although the skills of investigative journalists could be improved in these countries—especially with respect to reporting on corruption (which is the focus of an ROL program component in Argentina)—current levels of coverage are impressive.

A sixth lesson concerns *the need for reliable statistics on court management*. One crucial foundation for informed public debate on a justice system is sound data and analyses on the system's inner workings. The impact of investigative journalism and legal analyses will necessarily be limited if no one has a firm idea of the actual dimensions of court congestion, average time to process a case through the legal system, and so on. The problem here is scarcely confined to developing countries. Only in recent years has such applied research been undertaken in the United States, and in none of the three sample LDCs has much research been initiated,¹² while in the other three it is of quite recent origin. Accordingly, as was the case in the United States, misconceptions can evolve on what is wrong with the judicial system, and prescriptions proffered that may be irrelevant and wasteful of public resources, such as hiring more judges to ease court congestion when in fact the problem lies elsewhere.

Universities are natural candidates for undertaking research, but the study of judicial systems has not commanded much attention in the social science disciplines or in academic law. All three LDCs have institutes attached to universities that could serve as bases for supporting such research. Other candidates include judicial training institutes. USAID has supported the development of a judges' training institute in Honduras, as has the Asia Foundation in Sri Lanka, but neither institute has acquired the kind of stature and domestic political support necessary to take on a dynamic role in a judicial reform effort or for that matter to undertake research on judicial issues.

¹² In the Philippines, some research on court performance was undertaken in the mid-1980s (Legada and Demaree 1988), but the CDIE team could not find evidence of any recent follow-on analysis.

In the three ADCs, analytical research on case tracking and court congestion is already underway. In Colombia such work is by now well established at the *Instituto SER*, which has issued several studies on the topic (e.g., Velez et al. 1987). In Argentina and Uruguay similar efforts have begun more recently with USAID assistance (see, for example, Poder Judicial 1993 and Gregorio 1993 for Argentina).

A seventh lesson is that *polling can be an invaluable adjunct to an ROL program in assessing public demand for reform*. In the Philippines national opinion polling, which has received support from the Asia and Ford Foundations, has become a powerful tool for capturing the attention of government authorities and elevating issues of public concern on the policymaking agenda. In a recent development the Government in Sri Lanka has allowed the Bar Association, supported by the Asia Foundation, to poll its members concerning their opinions on how to improve the judicial system.

Given the constraints under which the media operate, the frequently unrepresentative nature of legislative processes, and the general inaccessibility of the political system to the general citizenry, polling is one of the few means by which the broader public can voice their concerns and preferences. The information from polling can then be used by coalitions and constituencies to buttress their agendas in pressing for particular reforms. This lesson is well demonstrated in the Philippines and Argentine cases.

Opinion surveys show a mixed public esteem for the legal system in the Philippines. A poll taken in early 1993 among the membership of the country's premier business association found the Supreme Court and the court system ranked among the five lowest public sector agencies.¹³ Mass public opinion seems somewhat less jaded, with more people expressing satisfaction than dissatisfaction with the justice system at the end of 1992 (although the balance in Metropolitan Manila, which is more politically articulate than the rest of the country, was negative) (Social Weather Report Survey 1992).¹⁴

In Argentina, recent opinion has been more pointed. In 1984, just after the democratic restoration, 57 percent of respondents told Gallup poll interviewers that they had confidence in the justice system; by 1991 the percentage had fallen to 26 and by 1993 to only 17. The proportion responding negatively rose from 42 percent in 1984 to 83 percent in 1993.¹⁵

How do public opinion surveys affect political leadership? Generally, they reveal little that is not already known or strongly suspected, certainly by leaders who make some effort to keep in touch with the public. But such surveys do make known opinions about public issues in a way that is difficult for leaders to deny or ignore. The open existence of the Argentine Gallup poll data and the Philippine business community opinion survey, for example, make it harder for the Supreme Courts of these two countries to act as if they enjoyed complete public sup-

¹³ Other agencies ranked at the bottom were the police and the national power agency. The national power agency at the time was responsible for electricity outages in Metropolitan Manila lasting 8 to 10 hours a day (Makati Business Club 1993).

¹⁴ Public opinion surveys present many problems in the ROL area—as elsewhere—of comparability of questions, equivalence of samples, and the like. In 1985, just before the end of the Marcos regime, a national survey found the number of respondents who thought judges could be bribed was equal to the number who thought they were honest. Almost three-fifths of the sample felt that lawyers could be bribed, whereas only two-fifths thought they were honest (Romulo et al. 1985). Unfortunately, more recent polls have not included such items.

¹⁵ Gallup Organization, personal communication, Buenos Aires, 1993.

port. Such data alone cannot force reform, but they contribute to a climate in which political will for reform is easier to find.

Will such an enhanced climate move the political leadership toward legal reform? Although firm predictions here are impossible, it can be said that in democratic systems public opinion working simultaneously through elite and mass levels and manifesting itself in lobbying, opinion polls, and voting is the basic force for change. If democracy endures in Argentina and the Philippines, these two countries can be expected to follow this path too.

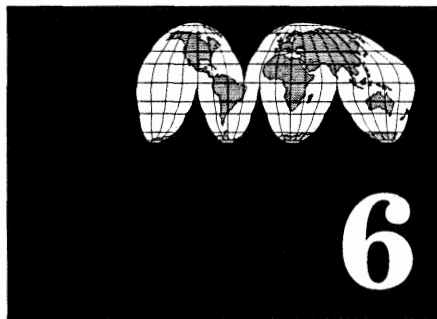
One last lesson offers a cautious though positive note. Although USAID, along with the Asia and Ford Foundations, has learned a good deal about building constituencies and coalitions for judicial reform, *there is still much to learn, particularly in the coalition building sphere.*

Conditions were favorable to coalition building in Colombia, although apparently less so in the other countries. Where coalitions did not form, it is

frequently unclear whether the problem was a consequence of unfavorable conditions or a function of deficiencies in USAID's approach. For instance, in Honduras, overseas educational visits could have been instrumental in forging a reform coalition but had little success in doing so. It may be that the visits themselves should have been more sharply focused, or alternatively that more Hondurans sent would have built a critical mass of interest in reform.

Coalition building is clearly labor intensive for the donor and therefore requires that donors be prepared to provide enough staff to support such an endeavor. This is demonstrated in the successful USAID coalition-building effort in Colombia.¹⁶ In conclusion, donor agencies could benefit from further analysis of the range of strategies for coalition building and the attendant level and kinds of support that might be needed. Analysis of coalition building strategies should be a significant element in future USAID-assisted efforts in ROL development.

¹⁶ The management implications of this strategy are discussed in the concluding section of this report.



6 Structural Reform Strategies

Lessons Learned

- Structural reform is the boldest and most difficult ROL strategy to undertake.
- The impact of structural reform is frequently diluted by the absence of pressures for accountability and enforcement.
- Introducing new structures may provide more returns than reform of older, entrenched institutions.

The Structural Reform Approach

When there is sufficient political will and the political leadership is ready to support legal reform, it is appropriate to consider the remaining strategies depicted in Figure 1 and Table 2. The question now becomes, Is the *legal structure* adequate to proceed further with reform? And, if not, What changes (i.e., strategy II in the analytical tree) are needed before access to the system can be widened (strategy III) and the system's operations can be strengthened (strategy IV)?

As noted earlier, the issue here about structure concerns the *rules* of the legal system, that is, the basic ways in which the justice sector conducts its business. In some situations, the system may require fundamental constitutional change, whereas in other circumstances just tinkering with procedures may be all that is needed. In still other justice systems, the structure may be so sound that no changes are needed, but none of the six cases studied fell into this category (and most likely, given the unending spate of suggestion for structural reform in the world's most advanced legal system,¹⁷ this category may be only the theoretical end point on a spectrum). In any event, for each of the six cases, at least some structural reform was undertaken, as indicated in Table 5. To put the matter another way, the answer to the study question, "Is the legal structure adequate?" is in no instance an unequivocal "yes."

A few of the reforms listed in Table 5 were part of programs supported by USAID or other donors, but most were identified independently by the host country governments. Specifically, donors helped to create most of the alternative dispute resolution (ADR) mechanisms, but had virtually no direct involvement in any of the other innovations. Does it make sense then to include structural reform strate-

¹⁷ For example, even in England, whose system of jurisprudence is often held up as a model, there have recently been strong calls for reform (Darnton 1993).

**Table 5. Structural Reform Rule of Law Strategies
in Six Country Environments**

Argentina	Colombia	Honduras	The Philippines	Sri Lanka	Uruguay
<ul style="list-style-type: none"> • Oral procedures (penal) • Judicial appointments • ADR 	<ul style="list-style-type: none"> • Constitutional redrafting ◊ <i>Fiscalía</i> ◊ Public Order Courts • ADR 	<ul style="list-style-type: none"> • Career judicial service 	<ul style="list-style-type: none"> • Continuous trials • Judicial appointments • Constitutional human rights guarantees • ADR 	<ul style="list-style-type: none"> • Constitutional reform • ADR 	<ul style="list-style-type: none"> • Oral procedures (civil) • Radical expansion of judiciary • Judicial appointments • ADR

Source: Extracted from Table 3.

Note: Shaded cells indicate initial strategy followed.

gies as part of an ROL development program? It does so for several reasons.

First, structural reforms have been essential to ROL development. As argued above, virtually all legal systems stand in need of structural change, and even one in relatively sound condition at a given time will need to transform itself periodically, as its societal environment inevitably changes. For example, many Latin American countries still operate largely under civil codes inherited more or less intact from the early 1800s before independence from Spain. Accordingly, a number of traditional practices have endured. Judges generally have to manage investigations and act as prosecutors in addition to conducting trials. And trials are conducted almost exclusively on the basis of written documents. These practices, however, have changed greatly in the European civil code countries that originated them. In these countries, forensic specialists conduct investigations, the prosecution function has been separated from the bench, and oral procedures have supplemented the traditional written modes in which trials are conducted. The absence of such structural reforms in Latin America makes for justice that tends to be slow, inefficient, and imperfect.

Second, changing the fundamental rules of a judicial system is delicate and sensitive work, often involving constitutional amendment or even a new constitution altogether. Such a task means in effect refashioning the core organs of the body politic, an effort even more delicate in many ways than an undertaking like economic "structural adjustment,"

which is certainly sensitive enough, as abundant donor experience has shown. While trustworthy foreigners might tender advice here and there on such matters, the actual reform task must be handled by the principal stakeholders themselves.

Third, ROL development (like other USAID-assisted efforts) is ultimately a collaborative dynamic between donor and host country in which the host country must willingly participate—perhaps with some nudging from the donor—if the development enterprise is to be sustainable. In donor terminology, ROL structural reform might be thought of as analogous to a "counterpart contribution" to ROL development. For these reasons, this report discusses the major structural reforms carried out in the six case studies irrespective of whether the impetus for reform came from USAID or another donor or, as has more often been the case, from within the legal system itself.

One further point must be made before discussing these reforms: Under the rubric of "structural reforms" only the reforms themselves have been included, that is, changing judicial rules. Building or strengthening the institutions to implement the new rules will be considered as part of access creation (III) and legal system strengthening (IV) strategies (see Table 2 and Figure 1).

In the review of the structural changes that follows, one common pattern of reform has been omitted from the country presentations: the *ADR mechanisms* that have been introduced. Such mechanisms, introduced in every country except Hondu-

ras, represent important structural innovations, but in each case they were also developed as institutions of access creation. They are, therefore, explored in Section 7 of this report, which deals with strategy III.

Structural Reform in Six Countries

Colombia undertook the most drastic structural reforms, perhaps because of the desperate straits in which the country found itself. At the beginning of the 1990s, President Cesar Gaviria launched a project to rewrite the national constitution for the first time in more than a century—an exercise that had two major impacts on ROL:

- Creating an *independent prosecutor* by setting up a *Fiscalía General*, which separated prosecutorial/investigative functions from the court system (where they had been the judge's responsibility as per civil code custom)
- Revamping the *Public Order Courts* to include anonymous judges (the *jueces sin rostros* or "faceless judges"), witnesses, and evidence in order to circumvent the intimidation and assassination of judges that had stymied vigorous prosecution of narcotics traffickers and guerrillas

USAID involvement in the two constitutional reforms was indirect, lying largely in the successful effort recounted earlier to bring together leaders of the major government ROL constituencies as members of the management committee of the NGO serving as the Agency's grant manager for ROL efforts.

The creation of the *Fiscalía General* occurred in July 1992 and was widely considered a major advance that relieved judges of responsibility for directing investigations and prosecutions so they could concentrate their attention on judging.¹⁸ The Public Order Courts had been instituted several years earlier to deal with narcotics and terrorism cases, but they had not been very effective in doing so nor in protecting court personnel, as was evidenced by conviction rates of less than 30 percent and in the assassinations of more than 300 court officials during the 1980s, virtually all of them in connection with such cases. Accordingly, it was thought that much stronger reforms were needed. Initially, at least, these reforms proved highly effective in terms of conviction rates and protection of court staff (although at some potential cost of due process), as will be seen in the discussion of legal system strengthening strategies in Section 8.

In Uruguay, where a consensus for legal reform was already in place, the ROL enterprise could begin with major structural reforms. Of the country's three reforms discussed here, trial procedure and expansion of the judiciary (clearly the more important ones) were carried out by the government before formal USAID involvement in ROL development. These reforms were as follows:

- A change from traditional procedures for conducting cases through written evidence and interrogatories (as customary in civil code systems) in 1988 to an *oral procedure code* for noncriminal cases
- A *radical expansion of the judiciary* in which 100 new judges were appointed, increasing the number of judges by about one-third¹⁹

¹⁸ The importance of this change can be gauged by the fact that for 1992, when the new agency was launched, its director, Gustavo de Greiff, was named "man of the year" by Colombia's leading newspaper and newsweekly (*El Tiempo*, December 31, 1992; *Semana*, December 29, 1992). He was also the subject of a very favorable analysis on the CBS television program "60 Minutes," aired December 5, 1993.

¹⁹ It might be thought that these new appointments were more in the nature of institution building (strategy IV in the analytical tree), but the massive size of the increase combined with the change in procedures argues for including it here as a structural reform strategy.

- A new method of *judicial recruitment*, whereby the Supreme Court would appoint only judges who had satisfactorily completed training at a new judicial training institute

These reforms were implemented by incorporating the new oral procedures in the entry training for the 100 new judges and gradually retraining sitting judges in the new methods. There appear to have been two beneficial results. First, the increase in the number of courts means that cases progress through the system faster. Second, the expansion means that judges receive fewer cases, which allows more time for review of individual cases, as the oral trial procedures require. Although in time the Supreme Court (which is charged with managing the national justice system) will determine the extent to which decisions (*sentencias*) are "better," it can already be concluded that these structural reforms have helped substantially in creating the conditions necessary for better justice. The same is true of the new recruitment system. Although it will take time to tell whether the newly trained judges are superior, it can be asserted that the necessary if not sufficient conditions for recruiting better judges have been laid down.

Argentina also introduced structural reforms, although these were considerably less far-reaching than those undertaken in Uruguay. The two most significant innovations were

- *Oral procedures* in the criminal court system
- A new *screening process* for judicial recruitment

The new oral procedures apply only to the federal courts system and only to some cases in the

criminal courts rather than to the civil courts in general, as in Uruguay. The new approach therefore applies only to a small portion of the overall caseload.²⁰ Further, in including only the federal courts system, the reform did not apply to the much larger provincial court systems, many of which had introduced oral procedures long ago. Still, these steps represent a significant change in the justice system and serve notice that reform is possible. The new screening board for federal judicial appointments also constitutes a hopeful sign, given Argentina's history of political appointments to the bench. Unfortunately, the executive branch (which has the authority to make judicial appointments) has been accepting only about one-fifth of the new board's recommendations, so in this instance serious reform remains largely a promise.²¹

In the *Philippines*, a "piecemeal" trial system in which judges habitually granted innumerable delays and continuances contributed greatly to endless cases and huge backlogs on court dockets. Only trial lawyers, who collected fees on a per-appearance basis, seemed to benefit. The 1987 Constitution specified that the trial process had to be expedited, and a 1989 reform mandated *continuous trials*, requiring cases to be completed within 90 days of their first day in court. A second structural reform focused on *judicial recruitment*. The new Constitution established a Judicial and Bar Council to nominate slates of candidates (three for each vacancy) for the higher courts to eliminate the blatantly political basis for such appointments in the Marcos era. Third, the new Constitution also included *human rights guarantees* against torture and political detention.

²⁰ In fact, oral cases are only a small fraction of the total criminal caseload, amounting to less than 2 percent of the total cases of all kinds processed through the federal court system (data from the Secretariat of Statistics, Supreme Court of the Nation, Buenos Aires).

²¹ At the end of 1993, there was some evidence of progress on the judicial recruitment front, as leaders of the two major political parties were reported in agreement to "depoliticize" appointments to the bench as part of a constitutional amendment (*Latin American Regional Reports - Southern Cone*, December 23, 1993, RS-93-10, pp. 6-7).

As in most of the other countries, in the Philippines these reforms were initiated and implemented by the host country government, independent of donor efforts. Thus they were already in place when donor-assisted ROL development work began to pick up speed in the late 1980s. Unlike the Uruguayan case, however, the Philippines' structural reforms were only partially effective, principally because political will was much less evident.

The continuous trial system appears to have had some effect in quantitatively decreasing the backlog, although its qualitative impact is much less obvious, and while the new nominating system has also had some impact, it is not clear how much nor in what direction. As for the constitutional human rights provisions, the situation under Presidents Aquino and Ramos has improved greatly from the one that prevailed during the Marcos era, but Amnesty International and State Department reports clearly indicate that abuses continue. As in Argentina, the introduction of some degree of structural reform in the Philippine justice system proved possible—showing that the system is not impervious to structural change—but the reforms have not had the same impact as in Uruguay.

Structural changes of profound magnitude are being undertaken in Honduras as well. In particular, USAID is supporting a transition to a merit-based system of *judicial recruitment* in place of one grounded in patronage appointments. USAID is assisting the judiciary in developing salary scales, job classifications, and technical manuals, along with procedures for the recruitment, examination, selection, performance appraisal, and promotion of judicial officials and judges based on merit. There is some initial success from the introduction of the new personnel systems, but the sustainability of such systems remains uncertain for the near future without continued USAID presence and support.

In *Sri Lanka*, USAID and the Asia Foundation are encouraging greater discussion among social and political elites on issues of constitutional change. USAID and the Foundation have been supporting a Sri Lankan legal think tank to sponsor forums where elites (prominent lawyers, judges, political and NGO leaders, academics) are invited to discuss important

constitutional issues. USAID and the Foundation are also funding a university-based applied research center to undertake policy analyses in support of the needs of parliamentary committees.

Creation of the policy research center rests on the assumption that ruling elites will welcome and use the information and analyses produced. However, where fundamental constitutional issues that affect the ruling elite's power are at stake (e.g., electoral laws and decentralization), decisions are frequently made independently of any outside analyses.

The experience in Sri Lanka suggests the difficulty of animating and facilitating meaningful constitutional discourse where political power is concentrated among a small ruling elite. But given that the financial cost of such endeavors is relatively small, even a modest prospect of positive impact probably justifies the effort. Activities of this type can be viewed as a kind of "venture capital investment," with admittedly high risks of failure but offering potential returns far exceeding the original cost.

Table 6 summarizes the study findings on structural reform. Significant reform took place in Colombia and Uruguay, the former stemming from desperation and the latter from an elite consensus favoring change. Argentina, the Philippines, and Honduras have also embarked on serious reform efforts, but in each case the political will required to see the reforms through appears tenuous at best. Each of the justice systems, except for Honduras's, has also embarked on an ADR effort (discussed in Section 7 of this report). The structural reforms across the six countries can be readily summarized:

- Four countries tried to change their methods of *judicial appointment* to make them more merit based and less politicized.
- Three countries undertook *constitutional reform*, although in each case for different reasons.
- Two countries introduced *oral procedures* into court trials.
- Five countries introduced *ADR systems* to decongest court dockets and make their justice systems more accessible and acceptable.

Table 6. Effectiveness of Structural Reform Strategies in Six Countries

Argentina	Colombia	Honduras	Philippines	Sri Lanka	Uruguay
Restructuring not very effective w/o political will	Major restructuring undertaken	Uncertain prospects for positive results	Limited effectiveness	Little effort except in ADR	Restructuring commensurate with need

Source: Extracted from Table 4.

Lessons in Structural Reform

Structural reform is perhaps the boldest and most difficult strategy to undertake in an ROL program, because it seeks to alter in fundamental and profound ways the basic rules governing the judicial system. This is most conspicuous, for example, in cases where a host government tries to initiate a transition from a patronage to merit system for appointing judges and judicial staff, as is being attempted in one way or another in four of the six study countries.

A move such as this toward depoliticization is bold in character because it calls for a major reconfiguration of power in both the external and internal dynamics of the judicial system. Externally, merit systems provide the judiciary with greater independence from the executive and legislative branches; internally, meritocracies diminish personalistic rule and favoritism, fostering more regularized and rational procedures.

Honduras has carried the merit system idea the farthest, since the system there comprises not only recruitment but also promotion. The Honduras experience also illustrates just how difficult such a reform can be, because it challenges the traditional basis of political power.

This is so for three reasons. First, patronage in Honduras, as in other countries, is a critical resource and medium of exchange within the larger political system. Political power derives less from holding formal positions of authority in fragile government institutions or adherence to embryonic norms of democracy than from the capacity of elites

to compete with rivals in building alliances with patrons and clients. Patronage is the glue enabling leaders to build and hold coalitions together, and instituting a merit-based judiciary means one less agency to mobilize in such maneuvers.

Second, political control of the judiciary implies a continuing ability to bend the rules of behavior in one's favor. Compliant courts are much less concerned with state corruption and suppression of rights than independent ones. Executive and legislative branches—accustomed to operating above and beyond the law—would prefer not to deal with the constraining influence of a more independent judiciary. Controlling appointments and promotions, ensuring that judicial terms are of short tenure, saddling the judiciary with meager and inadequate budgets, and passing legislation restricting court jurisdiction keep the judiciary in thrall.

A third (though comparatively minor) rationale for maintaining patronage in the judiciary is that Honduran Government employees are a primary source of financial support for the two major political parties. The incumbent political party dispenses the rewards of government employment to its followers and then “taxes” their salaries on a regular basis to build party coffers. Indeed, even persons hired to the judiciary under the USAID-supported career merit system still pay levies to the incumbent political party.

In brief, launching a structural reform effort will probably encounter passive or active resistance from vested interests and political factions most likely to lose power and resources because of the reform agenda. From a donor's perspective, however, when an opportunity arises to initiate basic reforms, the positive gains to be reaped justify modest invest-

ment, even in the face of some risk. And the fact that four of the six case study governments have embarked on some sort of structural reform indicates that there may well be considerable receptivity to such initiatives.

A second lesson is that *any legal reform process that does not include strengthening mechanisms to ensure enforcement will likely prove ineffective*. Many things can go wrong in structural reform. Unremitting political opposition and general bureaucratic inertia can gradually deplete commitment to the continuous enforcement of newly adopted reform measures. Changes and rotations in government leadership can mean that reformist coalitions will lose members and eventually their élan and political strength. In the absence of an enduring internal coalition, some kind of constituency needs to maintain a persistent watch to hold the government and judiciary in compliance with promised reforms.

The assessment uncovered several cases in which important reforms were introduced, with or without donor support, but they either never got off the ground or faltered after short-lived compliance. Thus, in Sri Lanka, because so many prison inmates were detained for excessively long periods awaiting trial (many too poor to pay bail), the legislature enacted a bill specifying a time limit after which the courts would be obliged to release prisoners on bond. However, numerous government officials have reported that in many instances the law is not being enforced. In addition, in some cases where the Supreme Court was issuing writs for release of detainees, the police and military authorities were ignoring them.

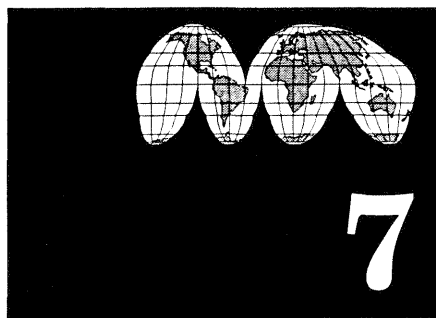
According to the Honduran Constitution, the judiciary should receive 3 percent of the national budget, but it generally receives only one-half of this amount. USAID has had only limited success in

urging the government to increase the judicial budget. In the Philippines, continuous trials were introduced to speed up case processing, but the innovation appears to have had a rather mixed track record. And in Argentina a new procedure for vetting court appointments through a merit-based scrutiny process has thus far proven ineffective inasmuch as the executive branch essentially refuses to recognize the validity of the scheme, preferring instead to continue on with the tradition of making political appointments to the bench.

A third lesson is that *introducing new structures may provide more immediate returns than trying to reform older, more entrenched institutions*. ADR mechanisms are the obvious case in point here. In Sri Lanka, there has been a high level of enthusiasm and commitment for the rapid introduction of a nationwide mediation system to replace the older structure. It could be contended in this case that abolishing rather than attempting to reform a highly politicized existing mediation structure allowed the new structures to begin afresh and unimpaired by past commitments and poor performance.

In Argentina and Colombia, ADR mechanisms represent new modalities for litigants who see the traditional court system as unresponsive, time consuming, and expensive. Following through in developing ADR enterprises in these two countries will likely bring much greater success than trying to revamp the regular court system.

Finally, in the Philippines and Uruguay, commercial ADR promises to provide a similar avenue to the many litigants who perceive the formal court system to be unsuitable. For the Philippines the problems center on delays, corruption, and unpredictability, with binding arbitration an attractive alternative. In Uruguay the issue is more simply one of lack of knowledge among judges concerning commercial law.



7 Access Creation Strategies

Lessons Learned

- Conventional legal aid, legal literacy, and paralegal activities are frequently quite limited in their impact.
- ADR is a low-cost measure that can provide expeditious and accessible services in settling grievances.
- Legal advocacy represents the most promising access strategy.

Typology of Access Creation as a Strategy

When political will is sufficient and the legal structure is adequate, the question becomes, Is there *full and equitable access* to the legal system? The issue here is one of degree. Although there is probably no legal system in the world with completely satisfactory access, some systems are clearly more closed than others. Of the six countries studied, the Philippines has arguably been the most restricted, with a legal structure mirroring the oligarchic control of the country's economic and political life.

Extensive corruption in the Philippine legal system allows the wealthy to "purchase justice" directly by bribing court officials and indirectly by their ability to retain competent legal counsel. Even criminal prosecution is largely a privatized affair in which complainants are forced to hire "private pros-

ecutors" to carry out the work of indolent, incompetent, or suborned public prosecutors.

Pervasive patterns of patronage and influence in this patrimonial culture also restrict access to justice in the Philippines. Membership in the social oligarchy ensures preferred entrée to the justice system. Because poorer people lack knowledge of the law, resources to hire lawyers, and personal connections to the upper strata, they essentially are excluded from the justice system and are helpless in fighting eviction proceedings, arbitrary arrests, and the like.

On the other hand, Uruguayan society appears to have relatively few problems of access to the law. High levels of literacy, less extreme distributions of wealth and poverty, a long-established welfare system, and a judiciary widely respected for its honesty mean that legal access for the Uruguayan poor is not a serious issue.

The other countries studied fall between these two extremes, although for the most part they resemble the Philippines more than Uruguay. Judicial services tend to be urban centered, where they are available to and used primarily by the more affluent. Similarly, lawyers generally congregate in urban and commercial centers where they can generate income from moneyed clients.

In brief, rural and low-income urban populations tend to be woefully underserved by legal services. Furthermore, most members of these groups have little knowledge of their rights, and, if they are legally literate, are distrustful or fearful of a judicial

**Table 7. Spectrum of Rule of Law Access
Creation Strategies**

Reactive & narrow <-----> Proactive & broad						
Type of strategy	Legal aid	Public defenders	ADR	Paralegal networks	Legal literacy	Legal advocacy
Countries where pursued	Argentina Philippines Sri Lanka	Argentina Honduras	Argentina Colombia Philippines Sri Lanka Uruguay	Philippines Sri Lanka	Philippines	Philippines

system that is alien and perplexing in its operations. Consequently, the rights of these individuals are easily transgressed by government agencies or third parties without legal rectification. Minority ethnic or racial groups are particularly vulnerable.

USAID and the Asia and Ford Foundations have used various access creation strategies to meet the needs of those on the margins of the legal system. Various access creation efforts can be arrayed on a spectrum as shown in Table 7. At the left of the spectrum (reactive and narrow) is support for *traditional legal aid* efforts, by which qualified lawyers assist clients, providing counsel and, if needed, preparing and presenting their cases in court. Legal aid organizations may be sponsored by either private or public funding. This kind of approach can be quite effective, but it comes at a high cost in terms of skilled legal staff time. Accordingly, this strategy has to be limited to relatively few cases, as during the Marcos period, when the Task Force on Detainees in the Philippines provided legal counsel to political detainees.

A second tactic entails strengthening government-funded *public defender* programs. In many instances, public defenders are already in place on the public payroll, and the major need is to use them more effectively. In contrast, legal aid programs require sustained efforts in recruiting and motivating lawyers and arranging programs so they can provide assistance on a part-time, *pro bono* basis, since legal aid attorneys generally support themselves with paying clients.

About midway on the spectrum are ADR mechanisms in which disputes are removed from the regular court system and channeled into other structures. Examples of these mechanisms include mediation boards, neighborhood counseling centers, and binding arbitration schemes. In some cases they are set up within the judicial structure (e.g., in Argentina the Ministry of Justice substitutes for the regular courts), whereas in others they may be built into the local government setup (as in the Barangay Justice System in the Philippines, which was designed to be a neighborhood dispute-settling scheme). Some ADR mechanisms may be completely in the private sector, as with the commercial arbitration bodies introduced into the Philippines.

Motivations for taking a dispute into an ADR channel can vary. They include

- *Time.* Many use ADR to avoid the prolonged delays resulting from huge case backlogs in many legal systems.
- *Cost.* ADR enables disputants to avoid the high lawyer fees encountered in the regular court system.
- *Probity.* In contrast to a court system perceived as corrupt and biased, ADR offers an option many see as significantly more honest.

ADR also offers the benefit of removing cases from the courts, which then can concentrate on handling the remaining cases more effectively.

A fourth access creation strategy is nurturing *paralegal networks* in which people at the neigh-

Table 8. Access Creation Strategies in Six Country Environments

Argentina	Colombia	Honduras	Philippines	Sri Lanka	Uruguay
<ul style="list-style-type: none"> • Pilot legal aid & mediation • Mediation expansion • Training for: <ul style="list-style-type: none"> ◊ public defenders ◊ mediators 	<ul style="list-style-type: none"> • Conciliation mechanisms 	<ul style="list-style-type: none"> • Training for public defenders 	<ul style="list-style-type: none"> • Paralegals • Legal literacy • Legal aid & internships • Commercial ADR • Barangay ADR 	<ul style="list-style-type: none"> • Legal services & legal aid • Mediation councils • Enhanced writs • ADR 	<ul style="list-style-type: none"> • Commercial ADR

Source: Extracted from Table 3.

Note: Shaded cells indicate initial strategy followed.

borhood level are trained in the rudiments of the law so they can advise and assist fellow citizens encountering trouble with the authorities. Paralegals possess a greater depth of knowledge than the recipients of legal literacy instruction, but even so their abilities are quite restricted.

A fifth strategy concerns *legal literacy* campaigns, which endeavor to impart some usable understanding of citizen rights to the public at large. This can be done through the media, NGO-sponsored legal aid clinics, or paralegals who function as a legal extension service in educating people about their rights.

At the proactive and broad end of the spectrum, the final access strategy involves providing assistance to *legal advocacy NGOs* representing groups such as ethnic or tribal minorities, bonded labor, urban squatters, or agricultural tenants, who have traditionally operated from a position of weakness in defending their legal rights. Advocacy NGOs frequently use lawyers who seek out and engage in class action, public-interest suits and test cases on behalf of groups who suffer from a common infringement on their rights. In addition these NGOs sponsor legal literacy and paralegal programs, which demystify the law and create self-reliant legal capacities within communities to reduce their dependency on outside legal expertise.

Moving from left to right on the spectrum, strategies become more comprehensive in their approach to access. Thus legal aid is a passive, reactive strategy (becoming operable only when a client

seeks out a legal aid lawyer) and is oriented only to individual clients. Individual services are characteristic of most of the access strategies. At the right end of the spectrum, legal advocacy strategies differ in kind rather than in degree from the other access activities. Legal advocacy strategies are proactive in that lawyers frequently take the initiative to identify disadvantaged communities or groups experiencing a common injustice and pressuring for redress through existing laws or, if needed, through lobbying to change or add new laws.

Access Creation in Six Countries

Among the six countries studied, the *Philippines* has the widest range of access creation efforts (see Table 8), perhaps in part because the need was greater but more so because of the Asia and Ford Foundations' interest in widening legal access. Their most important activities included

- *Training paralegals* to advise and assist citizens subjected to violations of their rights (e.g., arbitrary search and seizure, arrest)
- *Conducting legal literacy* campaigns (carried out in part by the paralegals) to spread awareness about citizen rights
- *Providing legal aid* by having law students work as interns and having young attorneys work *pro bono* to assist indigent clients, focusing on human rights

Table 9. Effectiveness of Access Creation Strategies in Six Countries

Argentina	Colombia	Honduras	Philippines	Sri Lanka	Uruguay
Some progress	Some progress	Progress unclear	Some progress	Some progress	Progress unclear
Source: Extracted from Table 4.					

abuses in connection with "warrantless arrests," mistreatment in prison, and the like

- *Supporting legal advocacy NGOs* in assisting marginal groups to defend their rights through law enforcement and enactment

Access creation efforts in the Philippines have not been limited to dealing with the formal court system, however. Two significant enterprises in ADR are important:

- The Makati Business Club (an association of the national business elite) has worked with Asia Foundation support in developing *commercial ADR mechanisms*, in particular, binding arbitration arrangements that bypass slow, corrupt, and unpredictable courts in deciding business cases.
- In 1978 the Government introduced a *Barangay Justice System* to provide ADR at the local municipal level, requiring that neighborhood disputants try this process before going to the formal courts. Government support for the Barangay Justice System had been modest, but in 1991 a newly overhauled local government code included a strong emphasis on local ADR, promising to put real teeth into this languishing enterprise.

Efforts in *Sri Lanka* have been similar to those undertaken in the Philippines, no doubt in part because the Asia Foundation is active in Sri Lanka as well.²² The Asia Foundation has supported government and university and NGO-initiated legal aid

programs. In addition, the recently initiated government support of a national mediation program is receiving funding from both the Foundation and USAID.

Mediation councils have been established in most districts of the country. They are staffed by volunteers who are trained in mediation. Mediators serve the wider population, particularly low-income disputants who cannot afford to avail themselves of conventional legal services. It is hoped that more citizens will bring their grievances to the councils rather than to the courts, which are severely congested. Early evidence indicates that the councils are at least reversing the trend of annual growth in formal court case backlogs.

Access creation in *Argentina* has proceeded on three fronts: legal aid, mediation, and public defenders, featuring collaborative efforts between NGOs and the state in the latter two areas. All activities have received USAID support.

- The Ministry of Justice has set up four pilot *legal aid* centers in Buenos Aires, staffed with young lawyers working primarily *pro bono*.
- The pilot centers also offer *mediation*, and the Ministry has recently expanded its mediation experiment to create a new cadre of mediators trained by an NGO specializing in that area.
- Another NGO has trained *public defenders* in the federal and Buenos Aires provincial court systems

²² The Asia Foundation connection between ROL activity in Sri Lanka and the Philippines was strengthened because the Foundation's legal specialist in Manila had also served in Sri Lanka, while the representative in Colombo had come there from holding the same position previously in the Philippines.

to provide better legal assistance to indigent defendants.

Colombia had only one initiative in access creation, but the initiative had potentially powerful impacts, at least in its beginning phase. This was the implementation of a local-level *conciliation system* largely through police organizations to which cases were transferred from the regular courts. In its first year, 480,000 cases were transferred to the new system, although only about 8,000 appeared to move on to resolution during that time. This effort has received modest funding from USAID.

In the other two countries, there has also been some attempt at access creation, although at considerably more modest levels. In Honduras, some training for public defenders was provided, while in Uruguay, a business-oriented NGO has initiated work in commercial ADR. Both efforts have received USAID support. Table 9 summarizes ROL effectiveness across the six countries.

Lessons in Access Creation

What has been the experience with regard to the impact of these access strategies? The first lesson is that *conventional legal aid activities are frequently limited in their impact*. Whether funded from private voluntary or public sources, such programs are generally underfunded and reach only a small portion of the population. For example, in Sri Lanka the government-operated Legal Aid Commission receives only \$10,000 annually and has only one office, located in Colombo. There are a number of privately funded NGOs that provide legal advice, but they do not have sufficient financial resources to take cases to court.

A second lesson is that *legal literacy efforts can be very extensive*, reaching large numbers of people, *but their practical value is quite limited* in terms of what can be imparted in 2 or 3 hours to scores of semiliterate people. To be sure, some country studies indicate that, once informed of their rights and available legal services, people are motivated to seek assistance in addressing their grievances. However, experience in the Sri Lanka program suggests the need for backup professional legal services to

help counsel these individuals and, if needed, process their claims through the judicial system. Legal aid of this nature is very labor intensive, and its reach is usually severely restricted by a limited supply of lawyers who are prepared to provide *pro bono* services.

Third, as the Sri Lanka experience further suggests, *paralegal campaigns targeted to specific constituencies and combined with followup professional legal aid may be more appropriate than investments in generic nontargeted campaigns*. Some NGOs in Sri Lanka plan to follow this approach in addressing the lack of worker rights in tea plantations and export processing zones. In another example, the Task Force for Detainees of the Philippines targeted its legal aid efforts to counteract human rights abuses of the Marcos regime in the early 1980s.

Many USAID ROL programs in Latin America emphasize expanding and upgrading *public defender* offices to help indigent defendants. In part, such programs are designed to alleviate the plight of the large number of detainees languishing in prisons awaiting trial or sentencing.

In Honduras, USAID provided assistance for hiring additional public defenders, but the effectiveness of the new attorneys was limited by structural and management constraints. For example, judges frequently did not allow public defenders to attend the pretrial court proceedings where abuse and mistakes are most likely to occur in a defendant's case. Similarly, it was found that most prison detainees had infrequent contact with public defenders.

A fourth lesson is that the *introduction of ADR mechanisms, such as mediation councils, is a low-cost measure for providing more expeditious and accessible services in settling grievances*. Experience in the five countries indicates that mediation can effectively settle disputes for many who cannot afford litigation. Indeed, under the new mediation law in Sri Lanka, disputants cannot go to court until they have first tried a mediation council.

Mediation can also be an effective way to pare court caseloads, thereby reducing costs to the state and the litigants. In Sri Lanka, government officials estimate that, since the inception of mediation, the

councils have settled approximately 60,000 cases that would have otherwise gone to court and added to the huge backlog of pending cases.

There are some limitations to the use of ADR. In many instances, such as in Sri Lanka, mediation councils are not mandated to deal with disputes arising at the interface between government agencies and the citizens and communities to whom they are presumably accountable. In addition, both parties to a dispute must appear before the mediator. Frequently the defendant will not make an appearance, which has happened in approximately 20 percent of the Sri Lanka cases. In response to this problem, there is discussion of granting mediators the power of summons, but opponents argue that such a move would violate the voluntary character of mediation.

Mediation also requires close supervision from the center to ensure that the councils and their mediators—frequently citizen volunteers—do not veer off course and violate the spirit and law of the mediation process. In Sri Lanka, a previous generation of mediation councils, now terminated, lost its credibility because of perceived incompetence and bias and a tendency to dictate decisions rather than facilitate agreements among disputing parties. Apparently some of the mediators won appointments as political favors rather than for demonstrated skill and commitment.

The fifth lesson is that *legal advocacy NGOs represent perhaps the most promising variant of all of the access strategies*. Not only do they aggressively use the law to assist disadvantaged groups, their advocacy and lobbying activities also make them an important constituency for reform in general. In this sense, *legal advocacy NGOs frequently serve a dual purpose in straddling access and constituency building strategies*.

Legal advocacy NGOs were in short supply in Honduras and did not capture USAID's attention in Argentina, Colombia, or Uruguay. There are a few legal advocacy NGOs in Sri Lanka receiving Asia Foundation or USAID support, but they have yet to develop strong grass-roots linkages to groups needing their assistance. Some of their leaders have pressed the courts for use of class action suits on the

model promoted by the Indian Supreme Court under the banner of "social action litigation" (SAL). SAL allows legal-resource NGOs to file cases on behalf of groups, such as bonded laborers, whose rights have been violated. However, the Sri Lanka Supreme Court has resisted its introduction to that country.

It is mainly in the Philippines that significant donor support exists for legal advocacy NGOs. The Asia and Ford Foundations have assisted legal advocacy NGOs in helping groups that traditionally operated from a position of weakness to defend their legal rights. For example, they assist coconut and sugar sharecroppers, urban squatters, and hill people seeking to protect their rights to ancestral lands. NGOs help mobilize these groups in filing claims in court and pressuring government agencies to enforce laws passed to protect their rights.

Some major legal advocacy NGOs have been successful in forcing government agencies to become more accountable in implementing particular laws and in some cases have worked with agency officials in drafting new laws. Where needed, the NGOs have successfully lobbied and pressured the legislature to pass these laws. In brief, the Philippines experience suggests that *investments in legal advocacy access strategies can yield high returns, higher perhaps than investments in any one of the other access strategies*.

A range of advantages and benefits sets legal advocacy apart from other access strategies. Taken together these advantages and benefits make a very appealing investment. Legal advocacy NGOs can be highly effective in

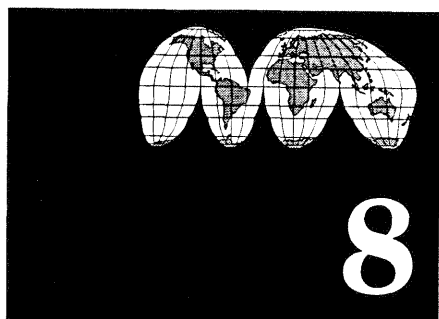
- *Extending benefits widely.* Legal advocacy strategies seek to maximize the use of the scarce supply of legal services for the poor and disempowered by focusing on issues involving groups of people rather than individual clients.
- *Achieving structural change.* In many instances legal advocacy strategies address structural conditions that perpetuate poverty and oppression rather than simply litigate ameliorative settlements.
- *Effecting targeted outreach.* Legal advocacy programs are frequently targeted to specific groups or

issues, rather than to generic or diffused needs, such as legal literacy, thereby funneling organizational energies toward well-defined needs.

- *Pursuing integrated strategies.* Legal advocacy features integrated application of a range of access strategies (e.g., legal literacy, paralegals, legal aid, media) that can be synergistically combined and targeted around achieving manageable and visible results.
- *Empowering citizens.* Legal advocacy seeks to empower communities and groups to take action in defense of their rights and to break bonds of passivity and dependency on outside resources.
- *Building constituencies.* As mentioned above, successful legal advocacy can produce constituencies that pressure government agencies and legislatures for legal reform.

- *Enforcing accountability.* Once groups and communities are mobilized as self-sustaining constituencies, their continuing vigilance can serve to keep government agencies responsible for implementing laws that would otherwise remain only on the books.

This is a powerful combination of features for reforming and buttressing ROL. However, it might be argued that the emergence of legal advocacy movements and NGOs must await the emergence of some form of civil society and an attendant capacity and receptivity for citizen mobilization. It takes self-awareness and a sense of self-efficacy for marginalized groups to take advantage of new opportunities for accessing the legal system, and it could well be that some countries have not yet reached that point.



Legal System Strengthening Strategies

Lessons Learned

- Legal system strengthening may not be the best place to begin for an ROL development program, but it can be a highly effective strategy.
- Successful components of legal system strengthening strategies vary widely among countries.
- Understanding clearly the quantitative aspects of court delay is difficult.

The Legal System Strengthening Approach

Of the four strategies discussed in this report, legal system strengthening is the bedrock of ROL development. Certainly political leadership must be supportive, legal structures must be adequate to support judicial development, and the justice system must be accessible to all citizens. But mobilizing demand for a better justice system, implementing reforms, and widening popular access do not ensure that the system will deliver better justice.

It has been argued in this report that political will must be sufficiently present before embarking on structural reform, and in turn that the legal structure must be adequate before taking up issues of access creation. Finally, full and equitable access to the

justice system ensures that when institutions are strengthened in the fourth strategy, the stronger systems resulting will offer the kind of justice citizens want. Ignoring these first three strategies can hobble ROL programs as was discovered in several country case studies.

But these initiatives do not guarantee the delivery of the developmental goods to the societies needing them. For that, judicial capacity building (traditionally “institution building”) is essential. New approaches to court management and recordkeeping must be developed and introduced on a systemwide scale, people must learn new skills to handle these approaches, equipment must be installed, and in some cases “structural development” will have to shift from metaphor to description as buildings are constructed or renovated to house new activities.

Again, it should be emphasized that, when answers to the first three strategic questions posed in the analytical tree are not sufficiently positive, legal system strengthening approaches may not be warranted. This was the case in Argentina and the Philippines, where these approaches were essayed along with structural reform at the beginning of ROL development. In both countries a strong case can be made that these approaches did not succeed because the groundwork that should have been laid first (in terms of the analytical tree model) was not in place. Consequently, it was necessary to step back to a constituency building strategy.

In Sri Lanka, legal system strengthening has produced results. In Honduras prospects for consolidating and sustaining the initial achievements

Table 10. Legal System Strengthening Strategies in Six Country Environments

Argentina	Colombia	Honduras	Philippines	Sri Lanka	Uruguay
<ul style="list-style-type: none"> • Judicial school • Federal court studies • CEJURA^a judicial center • Provincial court for Buenos Aires 	<ul style="list-style-type: none"> • Public order courts • Training for investigators • Court modernization (including statistics) • Procuraduría & Fiscalía • Law libraries • Analytical research 	<ul style="list-style-type: none"> • Recruitment & training for prosecutors • judges • Court modernization • Budget autonomy 	<ul style="list-style-type: none"> • Training for judges • lawyers • Law school aid • Law libraries • Statistical research 	<ul style="list-style-type: none"> • Law school curricula • Legal think tanks 	<ul style="list-style-type: none"> • Training for judges • court administrators • Statistics/MIS • Administrative reform

Source: Extracted from Table 3.

Note: Shaded cells indicate initial strategy followed. MIS is management information systems.

^a National Center for Provincial Courts

of the USAID structural reform and legal system strengthening strategies remain uncertain because of the absence of a solid base of coalition and constituency support. In Colombia and Uruguay, however, ROL efforts did not begin with legal system strengthening but with other strategies that soon led to legal system strengthening, and the experiences of these countries in ROL development have been relatively more positive.

This section reviews legal system strengthening activities undertaken in the study countries, how they fit into the analytical tree model, and lessons for ROL development. Because legal system strengthening is the last step in the model before "better justice" is achieved as the final ROL goal, this report devotes more attention to the strategy outcomes and results of legal system strengthening than to the other three ROL strategies.

Legal System Strengthening in Six Countries

Table 10 indicates the major legal system strengthening efforts undertaken in the countries

studied. The most straightforwardly positive case is *Uruguay*. As noted earlier, there was sufficient political will in place there to undertake legal reform almost from the start of democratic restoration in the mid-1980s. Consequently, ROL development began with two major structural reforms—introduction of oral procedures and radical expansion of judicial capacity—which were undertaken before USAID-supported ROL efforts were initiated. With these two reforms well underway by the time USAID-assisted efforts came on line, it was eminently feasible for legal system strengthening efforts to provide the following:

- *Training in the oral procedure system* for both newly appointed judges and sitting judges to acquaint them with the new scheme
- *Training for court administrators* in such areas as centralized supply systems, personnel administration, and accounting procedures
- *Statistical databases and management information systems* to better manage the caseload

Although there were minor difficulties with these innovations (e.g., judges, who were accustomed to working alone—often at home—while reviewing written interrogatories and the like, now had to appear in court for oral proceedings), they appear to

be proceeding on course. As the number of courts has increased with the 100 new judges added to the system, the number of cases handled by each court has decreased considerably and in courts that have introduced oral proceedings the time required to process the average case has diminished markedly—from around 500 days in the mid-1980s to fewer than 350 days in the early 1990s.²³

In *Colombia*, with the justice system in a state of siege and constituencies ready to promote serious legal reform, much of USAID's management effort was spent nurturing a coalition within the forum provided by the management committee of the NGO intermediary that was overseeing the USAID ROL enterprise.

While the coalition building effort was underway, legal system strengthening activities were also begun and were continued after the coalition was in place and the constitutional reforms of 1991 were introduced. Prominent among legal system strengthening activities were

- Strengthening the *Public Order Courts* (with their anonymous judges and procedures set up to try guerilla terrorist and narcotics trafficking suspects)
- Training in *forensic techniques* for government investigators, who were using long outdated methods
- Supporting *court modernization* in the form of
 - ◊ A pilot project in a Medellín suburb in which previously isolated judges began operating as a group with centralized recordkeeping, administrative management, and regular information exchange
 - ◊ Introduction of computer-based management information systems in several courts to better control case administration processing
- Assisting the new *Fiscalía General* (set up as an independent prosecutorial agency) and the

revitalized *Procuraduría General* (charged with monitoring due process and human rights in the justice system and taking the lead in investigating corruption)

- Enhancing the country's *jurisprudential knowledge base* by providing law libraries to judges who had been operating with little or no access to current legal codes and by promoting a national network for jurisprudence that would offer computerized decisions
- Sponsoring *analytical research* (primarily by a "think tank" NGO long involved in legal studies) on effectiveness and efficiency in the justice system

Several of these efforts had begun to show concrete results by the time the CDIE team visited Colombia. Revamped Public Order Courts had increased convictions from 30 to about 70 percent in their first year of operation. Court modernization efforts near Medellín had reduced the case backlog by almost one-half. The new *Fiscalía General* was greeted with much enthusiasm, exemplified by his selection by a weekly newsmagazine and a Bogota newspaper as "man of the year" for 1992. And legal research had begun to yield significant studies. However, there was no systematic evidence that forensic capabilities, law libraries, or the jurisprudence network were being put to practical use, although it could be argued that these are longer term efforts that will take some time to show results.

An important unanswered question was how the Public Order Courts would impact on human rights. Colombia has long had an unenviable record of abuses in this area, and the emphasis on anonymity for all except the accused in the Public Order Courts could conceivably cause serious problems in this regard. The *Procuraduría General* is tasked with safeguarding human rights in Public Order Courts, but how well the office has been discharging this responsibility was not clear at the time of the CDIE team's visit.

²³ Data from the USAID-assisted *Proyecto Modernización del Poder Judicial*. Some further analysis is needed on these data, and the figure given in the text should be regarded as an estimate.

Also on the negative side were two developments beyond the control of USAID-assisted ROL efforts in Colombia. First, in July 1992 the notorious drug baron Pablo Escobar escaped prison under circumstances that revealed undeniably what had long been public knowledge—that his jail accommodations were embarrassingly luxurious and that he had been directing his drug operations from prison. Then in September 1992 one of the “faceless judges” was assassinated while conducting an important case against the Medellín drug cartel, confirming what had also been widely believed—that the elaborate protection system organized for the Public Order Courts was penetrable.

The combined effect of these two reversals has put the Colombian justice system—and the ROL development initiative—under considerable strain. Even so, as of December 1993, more than 1 year later, there had been no further assassinations of “faceless judges,” so security has proved tighter than many had thought. Pablo Escobar is now dead after a police assault, but the struggle to bring narcotics trafficking and narcotics-related violence under control is far from over as other traffickers eagerly take up the slack left in his wake.

A principal focus of legal strengthening in Sri Lanka was in

- Strengthening the ADR movement
- Strengthening the *Judges' Training Institute*
- Improving law school curricula

Mention has already been made of Asia Foundation and USAID support for mediation councils, a mechanism for ADR. The Asia Foundation discontinued assistance to the Sri Lankan Government operated Judges Training Institute because, without constituency or coalition support and attendant political will, the institute had not become a dynamic and central part of the judicial system.

A primary focus of the Asia Foundation in legal system strengthening is on improving university-level law education in the three public institutions that train lawyers. It is worth examining this effort, since among the six countries, only Sri Lanka has received donor support for university law training.

Law training at the Sri Lankan institutions has been highly theoretical, with little emphasis on critical analysis, practical applications, or exposure to issues of law and development in Sri Lanka. The curriculum focuses almost entirely on law subjects with no instruction in the behavioral sciences. To rectify this condition, the Asia Foundation is working on several fronts to bring greater intellectual vitality and relevance to the educational process.

First, the Foundation is financing an ambitious project to support Sri Lankan scholars in writing textbooks in 15 subject areas, featuring the use of Sri Lanka case law materials. The absence of such textbooks results in law faculty relying on lectures and rote learning as the primary mode of instruction.

Second, the Foundation has helped law faculty at the University of Colombo reform the curriculum, with particular emphasis on modernizing courses in commercial law and comparative constitutional law and introducing new courses in human rights law and environmental law.

Third, to provide a more applied and participatory educational experience so students can begin to understand the relevance of the law to larger issues of social and economic change, the Foundation has supported the establishment of the Open University's legal aid clinic to sponsor legal literacy workshops and provide free legal aid to low-income individuals. Law students are required to serve in the clinic as part of their educational experience.

But aside from Asia Foundation assistance, what else is energizing the changes underway at these two law faculties? Impetus comes in part from faculty, especially faculty who have had overseas training and observations—some of which the Asia Foundation sponsored. These faculty realize that current methods of instruction and course content need reform. Furthermore, many are inspired by an activist vision of the law faculty, with faculty and students learning to adapt and apply the law to address major social issues.

The impetus for change is also coming from students who realize that the curricula must be made relevant to current social realities. Student

dissatisfaction with the curriculum has emerged because many law students are from rural areas, where conditions are very different from the academic and urban-centered concepts of the law presented in the classroom. These students in particular have been supportive of course changes sponsored by the more innovative faculty members.

What has been the impact of changes underway at these two universities? Some faculty at both universities are championing an institutional paradigm that envisages the faculties becoming instruments of social and economic advancement, particularly for the large segments of society suffering some form of impoverishment or injustice and lacking access to legal services. Thus activities of the legal aid clinic embody an approach to law and society that places a premium on legal activism and advocacy on behalf of low-income people, with particular attention to women's rights.

The leadership of the Open University Law Faculty envisions an activist role for the faculty, one of representing and advocating interests of the legally disadvantaged in public policy forums. Thus, faculty have been active in lobbying judicial officials for children's and women's rights. Faculty research indicates that the courts are excessively lenient in dismissing cases involving abuses of children and women. The Legal Aid Centre at the University of Colombo is beginning to establish an impressive record of research, workshops, and publications on major issues of law and social change. Its most recently completed research involved a 2-year study of women and domestic violence (De Silva and Jayawardena 1993).

The research on violence against women was undertaken by 15 students on a volunteer basis above and beyond their course work and without extra credit. In 1992, 25 students worked together with law students from other South Asian countries in a symposium on legal education, which produced a final publication proposing major revisions in curricula and teaching methods aimed at educating lawyers to become "social engineers," wielding "the law to facilitate and influence positive social change," particularly for redressing major social and economic injustices (Gunawardhana et. al. 1993).

In summary, two university law programs are beginning to adopt more progressive and activist approaches to law training. The third law training institute faces major structural constraints in adopting innovations. Why are these innovations important? First, providing a broader, more relevant educational experience during university preparation is extremely critical. This is because in-service training in the form of required attendance at workshops for midcareer lawyers and judges is nonexistent.

Second, activist faculty who are instituting these changes constitute a key intellectual resource seeking to use research, critical analysis, and reformist perspectives to foster public and policy dialogue on important issues of legal and judicial reform. Since the Asia Foundation's program with the universities is only a few years old, it is too soon to know what kind of longer range impact it will have on influencing public policy. At the moment, however, it is one of a few significant constituencies in Sri Lanka pushing to keep issues of reform on the public agenda.

Initial *Argentine* experience with legal system strengthening was largely unsuccessful at the national level, but it proved possible to recover from this setback by moving legal system strengthening efforts to the provincial level, where there was more fertile soil in which to root. The first round of work with the Supreme Court of the Nation had three main elements:

- A *judicial school* was to be set up to offer training to judges and court administrators.
- An indepth *analysis of the federal courts* would recommend reforms to improve system effectiveness.
- A *judicial studies center* (*El Centro de Estudios Judiciales de la República Argentina*) would serve as a research facilitator and networking mechanism for provincial courts.

As noted earlier, none of these endeavors enjoyed much success. Political machinations from outside the Supreme Court and personal squabbling within it scuttled the school and rendered analyses unusable. While the center was initiated, its agenda thus far has been empty.

However, USAID was able to transfer the venue of some legal system strengthening activities to the provincial capital at La Plata, where the Supreme Court at that level has been much more responsive than its counterpart at the national level. Thus it has been possible to

- Plan constructively for a *judicial school* (now being set up)
- Offer several *extension short courses* on special topics for judges and other court personnel (e.g., in mediation techniques)
- Set up a computerized *registration system for expert witnesses*
- Begin an *administrative decentralization* process transferring much of the court management burden (e.g., budgeting, personnel actions) from the provincial supreme court to lower courts in the system
- Initiate a *court information system* to guide citizens through the court to the office they need to find

These efforts are quite modest; total USAID funding allotted to the provincial Supreme Court at La Plata over 5 years is a bit over \$150,000. But cumulatively, these small activities show that legal system strengthening initiatives are possible in the Argentine judicial system.

An additional activity in Argentina was the development of *statistical systems* to track the flow of cases. A USAID-supported study at the federal court level endeavored to measure the flow of cases in different types of courts to assess the extent of delays throughout the justice system. At about the same time, data-gathering operations were instituted in the federal courts and the Buenos Aires provincial courts as well.²⁴ In the first few years, however, none of these endeavors appears to have produced information in a form that will facilitate understanding of backlogs and delays. Production of useful and usable data is going to take a while longer.

In the *Philippines*, ROL efforts also began with legal system strengthening strategies, in particular with several initiatives supported by the Asia Foundation:

- *Training for judges and lawyers*, for example, in the new continuous trial system introduced in the late 1980s
- Support for *upgrading law schools* both for faculty study tours and curricular improvements
- Expansion of *law libraries*
- Development of *statistical case-tracking systems*

About the time these efforts were underway, however, the Asia and Ford Foundations were concluding that in a political economy as heavily oligarchical as that of the Philippines there was little hope for success in such endeavors (George 1991; Hein 1993; Jensen 1993). A lack of political will at the top of the system and corruption throughout meant that legal system strengthening efforts would yield minimal results at best in reforming the judicial system. Accordingly, these donors began to put most of their assistance into constituency/coalition building and access creation strategies, as discussed above.

In addition to the structural reforms mentioned earlier, the *Honduran* ROL program also featured *training for public prosecutors and justices of the peace*. Although both groups reported that this training was useful in their jobs, they found themselves significantly constrained in using new skills and knowledge by the inefficient, antiquated systems in which they worked.

A second legal system strengthening endeavor, mentioned earlier, focused on *court modernization*, featuring efforts to modernize and computerize personnel systems and budgetary procedures, including accounting, inventory, and auditing processes. The anticipated next step of this effort will focus on bringing order to docketing and recordkeeping in general.

²⁴ The provincial operation received some USAID assistance as one of the many small activities supported in La Plata, but the federal data-gathering effort did not.

Given the obstacles and failures that several of the countries encountered in reforming court administration, it is worth commenting on this experience and what it suggests about factors inhibiting administrative change.

In many developing countries adequate structures for court administration are lacking, particularly budgetary and personnel management systems. Systems for efficient recordkeeping and caseload management are also absent. Records are lost or misplaced, prolonging and delaying court proceedings. In criminal proceedings, delays can result in pretrial detention of defendants for a year or more. These conditions of court maladministration may seem easily correctable, but frequently they reflect a larger set of political factors that are somewhat less mutable to change. In particular, in more patrimonial regimes, the absence of systematic procedures of administration allows judges and court administrators to manipulate budgets, appointments, and promotions in favor of their clients and patrons.

In addition, authority over court administration is frequently fragmented, with judges exercising little power or interest in enforcing discipline and probity within administrative staff. This opens a wide range of rent-seeking opportunities for staff, because they not only control access to case records and evidence but frequently also have a significant role in court management, such as in Sri Lanka, where court registrars decide which judge will hear a case.

With such discretionary powers, court staff find it tempting to solicit bribes from lawyers. Conversely lawyers entice court staff with bribes on behalf of plaintiffs or defendants in order to delay hearings, to avoid summoning particular witnesses or defendants, or to misplace files. Opportunities for rent seeking by court staff increase in proportion to the number of transactions per case. The same observation applies to lawyers who receive a fee for each appearance in court, which constitutes an incentive to delay and repeat court hearings and to file appeals. Cynics will argue that this is why judgments are easy to appeal and why courts are filled

with appeals in many LDCs. What seems like a perverse management system from the outside is often a very productive one for those who work within it.

From the ROL development standpoint, any effort by inside or outside reformers to streamline and expedite court proceedings can encounter an organizational culture, including perverse institutional incentives, weighted in favor of perpetuating lax and imprecise judicial practices. Certainly there is enough evidence from the case studies to conjecture that in some instances judges and court staff are occasionally engaged in a tacit, unholy alliance to conceal their informal privileges.

To be direct, many people may lose with the intrusion of a donor-sponsored court-modernization effort. Judges, for example, might lose some discretionary powers if their schedules are more rigidly dictated by the introduction of efficient and timely court procedures requiring considerably more time on the bench as well as more homework in reading case documents. Potential outcomes like this help explain why a technocratic approach to court modernization frequently has only marginal impact on traditional patterns of judicial conduct.

Table 11 summarizes experience with this strategy across six countries. In two countries—*Uruguay* and *Colombia*—legal system strengthening endeavors made significant progress although in Colombia, exogenous factors appeared to undo a good part of the gains achieved. In Argentina, although legal system strengthening failed at the national level for lack of sufficient political will to see it through, it was possible to transfer a good deal to the provincial level where the prospects for success appear much brighter.

In the Philippines, political will has been lacking for supporting legal system strengthening ROL development, and in Honduras such will remains relatively soft and indeterminate. Finally, in Sri Lanka, the main thrust of ROL was on an access creation strategy from the beginning; consequently a legal system strengthening strategy did not constitute the drag on progress that it did in other cases observed.

Table 11. Effectiveness of Legal System Strengthening Strategies in Six Countries

Argentina	Colombia	Honduras	Philippines	Sri Lanka	Uruguay
Some work feasible even w/o earlier steps fully in place	Efforts making headway, although set back by exogenous factors	Uncertain prospects for positive results	Little hope for positive results at present	Mixed success	Efforts highly effective

Source: Extracted from Table 4.

Lessons in Legal System Strengthening

The most obvious lesson—alluded to several times in this report—is that *legal system strengthening is not necessarily the best place to begin an ROL development program*. In particular, if the prior steps laid out in the analytical tree are not sufficiently in place, legal system strengthening will almost certainly be unproductive, as was the case in Argentina and the Philippines. On the other hand, when there is determined political leadership, the legal structure is sound, and access is reasonably wide, legal system strengthening can yield positive results, as was observed in Colombia and Uruguay.

This may not be a palatable lesson for USAID or other international donors to digest, with their long experience in institution building. Given decades of development work in institution building, ranging from agricultural credit to family planning to wastewater treatment, it is scarcely surprising that a similar strategy was adopted for promoting ROL development in Argentina, Honduras, and the Philippines. Fortunately, it proved feasible to change approaches midstream in Argentina and the Philippines and in addition to transfer the institutional venue in order to maintain some of the original legal system strengthening approach in Argentina.

A corollary lesson is that *when logical prior steps have been taken, legal system strengthening can be a very productive strategy*, as was observed in Colombia and Uruguay. In Uruguay, where the requisite consensus for legal reform emerged as part of the democratic restoration of the mid-1980s,

structural reforms were initiated toward the end of the decade, and there was little need to increase access to the justice system. Accordingly, legal system strengthening activities launched by the USAID-supported ROL program proved quite successful. In Colombia, the USAID representative facilitated and nurtured the emergence of a coalition for legal reform in the management committee of the implementing NGO. Structural reform came as a result of the first constitutional revision in more than a century, and thus legal system strengthening activities were eminently feasible.

A third lesson is that *the most successful legal system strengthening strategies in each country were peculiar to the particular legal system environment found there*—a pattern that can be contrasted to access creation strategies, where it was observed that ADR approaches found a warm reception in five of the six countries studied. For legal system strengthening there was a much greater difference between what seemed to work in one place and what appeared successful in another. In Argentina it was a variety of small institution building activities at the provincial level, whereas in Colombia it was the Public Order Courts. In Uruguay it was training in new oral procedures, while in Sri Lanka it was helping to establish the national mediation program.

A fourth lesson is that *introducing court statistical and database systems involves more than just counting cases*. Statistical exercises launched in Argentina have produced large quantities of data in the first few years of work, but so far this mass of information has been of little use in creating an understanding of the “why’s” and “where’s” of bottlenecks, delays, and backlogs. Uruguayan sta-

tistical work has produced more coherent and accessible reports, but considerably more is needed to make the information useful.

Getting a firm grip on quantitative aspects of court delay is a very difficult task, particularly in justice systems characterized by isolated and in-

dependent judges. It cannot be assumed that constructing a methodology for tracking court activities will be simple. But if a judiciary is to gain control of its cases and reduce its backlog, it must first develop a way of finding out what is happening—and this takes time.



Summing Up: Some Tentative Imperatives

Aside from the specific lessons identified in each of the previous four sections, several cross-cutting, suggestive insights need to be highlighted in concluding this report. A hesitant adjective is deliberately used in the title of this section, because USAID and other agencies are still low on the learning curve of what accounts for success and failure in ROL projects. On the other hand, guidance is needed in a program where expenditures can mount into the tens of millions of dollars. Thus the paradoxical title “tentative imperatives” has been selected. The first group of imperatives relates to the substance of ROL programming, while the second focuses on USAID management issues.

ROL Development Strategies

The analytical tree discussed in Figure 1 suggests that in many countries the *preconditions* for undertaking an effective ROL program will be marginally present at best. Constituencies and coalitions may be so fragmented and fractious, and the political environment may be so inimical to judicial reform (perhaps even to the notion of ROL), as to eliminate any effective program activity. Unfortunately, many countries fall into this category.

Second, in the countries lying in the gray zone characterized by a mixed constellation of both favorable and unfavorable conditions for reform, an *initial strategy of constituency and coalition building* may be in order prior to engaging in significant institution building. This may take some time. In

Colombia, successful coalition building entailed a 6-year effort by the USAID officer, which laid the basis for subsequently launching an institution building effort.

Third, in countries where a legal system strengthening strategy is warranted in the early stages of ROL development—presumably a relatively small number if the analysis here has any validity—there is a *hierarchy of institution building problems*, increasing in difficulty with each ascending step. Traditional institution building approaches stressing commodity drops (computers, for example), human resource training, and improved management systems represent a lower order of difficulty. Changing long-standing organizational procedures, structures, and subcultures (which is often essential for making the lower order innovations effective) constitute a higher order of difficulty. These latter tasks are intensive in terms of time and technical assistance.

Fourth, much of the analysis in this report suggests that a paradigm featuring a “technical fix” or engineering approach to institutional change is inappropriate for understanding and prescribing the process of ROL reform. Rather, an approach that leans heavily on the insights of political economy and emphasizes constituency and coalition building would be more suitable for envisaging and designing ROL strategies. In essence, *USAID officers need to think politically, rather than bureaucratically, in approaching ROL reform.*

Fifth, holding the state accountable for continuous enforcement of agreed-to reforms is a critical factor in any reform agenda. This requires *contin-*

ous prodding and pressure by constituencies outside the justice system, a feature that highlights the importance of an early constituency building strategy as a means of sustaining institutional change.

Sixth, if there is one precondition for effective constituency building, it is a *free press*. Without a public arena where issues of reform and accountability can be researched and debated, the prospects for moving reform higher on the national policy agenda seem limited.

Seventh, an especially attractive constituency building strategy entails supporting *legal advocacy NGOs*. These organizations populate a wide range of developmental sectors (e.g., environment and natural resources, women's rights, and urban poverty), and together they can make an important contribution to ROL because they are inexpensive to support, largely self-directed, and represent a proactive approach to improving conditions for their constituencies. This may suggest that more consideration should be given to a multisectoral approach to ROL efforts.

Eighth, of the strategies essayed in the countries studied, *alternative dispute resolution mechanisms* were the most popular, finding representation in five of the six cases. Regardless of what other strategies seemed appropriate in these five judicial systems, ADR proved an attractive approach as well. This pattern suggests that ADR should have a more central role in USAID's ROL development planning.

USAID Management Issues in ROL Development

First, in many instances USAID ROL projects do not require large expenditures of financial resources. However, they do need *intensive USAID staff involvement* to move forward the process of dialogue and change within host government institutions and constituencies. In Colombia, Argentina, and Uruguay, much of the success attained by ROL programs was directly related to an intensive commitment of USAID staff over significant periods of time in order to build and nurture program efforts. In the Philippines, a similar level of donor

effort was invested by the Asia Foundation. As USAID contemplates reducing its overseas direct hire personnel in the future, such investments in terms of professional staff time may become more difficult. ROL development is unlikely to work well with both small funding levels and low commitment to staff time.

Second, USAID can serve effectively in a *pioneering or trailblazing capacity* in the ROL field, acting as an experimental, risk-taking innovator to develop approaches that can, when proven, be taken over by multilateral donors willing to make substantial investments in this sector. The Agency's experience with a series of small and experimental grants in Uruguay is leading to a significant Inter-American Development Bank investment in ROL, and in Argentina there is good prospect for the World Bank to take over many of the efforts that the USAID program has developed. In both cases, multilateral donors viewed USAID as a flexible operation capable of experimenting to find successful ROL strategies that they could then take over to support with substantially larger funding. As the Agency looks ahead to a time of significantly constrained resources, this trailblazing approach appears increasingly attractive.

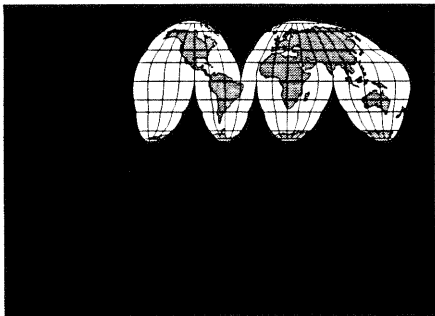
Third, ROL development programs receive a considerable boost when there is a *policy convergence* between host government priorities and those of the U. S. Government. In Colombia, such a convergence appeared to exist between a host country concern about narcotics-related violence ("narco-violence") and a U.S. Government concentration on narcotics trafficking ("narco-trafficking"); both sides could focus on the narcotics dimension in strengthening the judicial system. In Argentina, a convergence shows signs of coalescing around the issue of *seguridad juridica*, an expression that refers to the legal climate for business enterprise. And in the Philippines, a similar convergence may arise with respect to intellectual property rights, although the prospect is less clear in this case.

Fourth, using *intermediary organizations to manage ROL programs* has proved highly effective in five of the six cases. In Argentina and Colombia such agencies were host-country NGOs, whereas in the Philippines and Sri Lanka an American NGO

assumed this role, and in Uruguay an international organization did so (the United Nations Development Programme). Their precise roles varied widely—more policy oriented in some cases while primarily administrative in others. But in all cases these intermediaries were important in insulating the United States in the delicate area of ROL, and in several cases they were valuable in constructing ROL strategies as well.

Fifth, many of the more successful ROL initiatives observed were *modestly priced activities*. The Courtwatch enterprise in the Philippines, for example, received Asia Foundation support of less than \$100,000, while the institutional reforms implemented in the Province of Buenos Aires in Argentina, which included some half-dozen significant activities, was supported with about \$170,000 from USAID over several years.

A final management issue concerns the chance of *technology transfers becoming a "price" or "transaction cost" of pursuing the more political efforts embodied in strategy I*. USAID may well find itself constrained in the future by U.S. Government policy, as it has been in the past (e.g., in the Central American region) to support ROL initiatives, even when the preconditions spelled out in Section 4 have not been met. In such circumstances, the Agency may find itself directed to provide legal system strengthening support in the justice sector, even when such assistance offers little chance of succeeding. Even so, it may still be possible to launch some of the activities we have explored under strategies I and III, while at the same time absorbing the costs of the technology transfers that compose strategy IV as a kind of "transaction cost."



Appendix

Table A-1. Varieties of Rule of Law Assistance in Six Countries

Type of effort	Argentina	Colombia	Honduras	Philippines	Sri Lanka	Uruguay
<i>U. S. Government</i>						
<i>Funded Activities</i>						
USAID stand-alone project		X	X			
USAID country component of regional project	X					X
USAID project grant				X	X	
USAID nonproject grant		X				
Host-country NGO as USAID intermediary	X	X				
United Nations Development Programme as USAID intermediary						X
The Asia Foundation				X	X	
<i>Non-U. S. Government</i>						
<i>Funded Activities</i>						
Ford Foundation				X		
Other bilateral donor				X		

Table A-2. Rule of Law Development Programs in Six Countries

Country	Program Dates	Funding Provided	Nature of Program	CDIE Team Visit
Argentina	FY 1989-1993	\$2.0 m	Series of small grants under Latin America and the Caribbean regional Administration of Justice project	Sept.-Oct. 1993
Colombia	FY 1986-1996	\$2.7 m in 1986-91 \$36 m in 1992-96	Series of small grants followed by stand-alone project	June-July 1992
Honduras	FY 1987-1994	\$15.8 m	Judicial component of \$34.2 m USAID democracy project	Aug.-Sept. 1992
Philippines	FY 1988-1993	\$2.3 m	Series of small USAID and Asia Foundation grants	March-April 1993
Sri Lanka	FY 1980-1993	\$1.5 m	Series of small USAID and Asia Foundation grants	July-Aug. 1993
Uruguay	FY 1990-1993	\$0.85 m	Series of grants to NGO & Supreme Court under Latin America and the Caribbean regional Administration of Justice project	Sept.-Oct. 1993

Table A-3. Selected Quality of Life and Economic Indicators in Six Countries

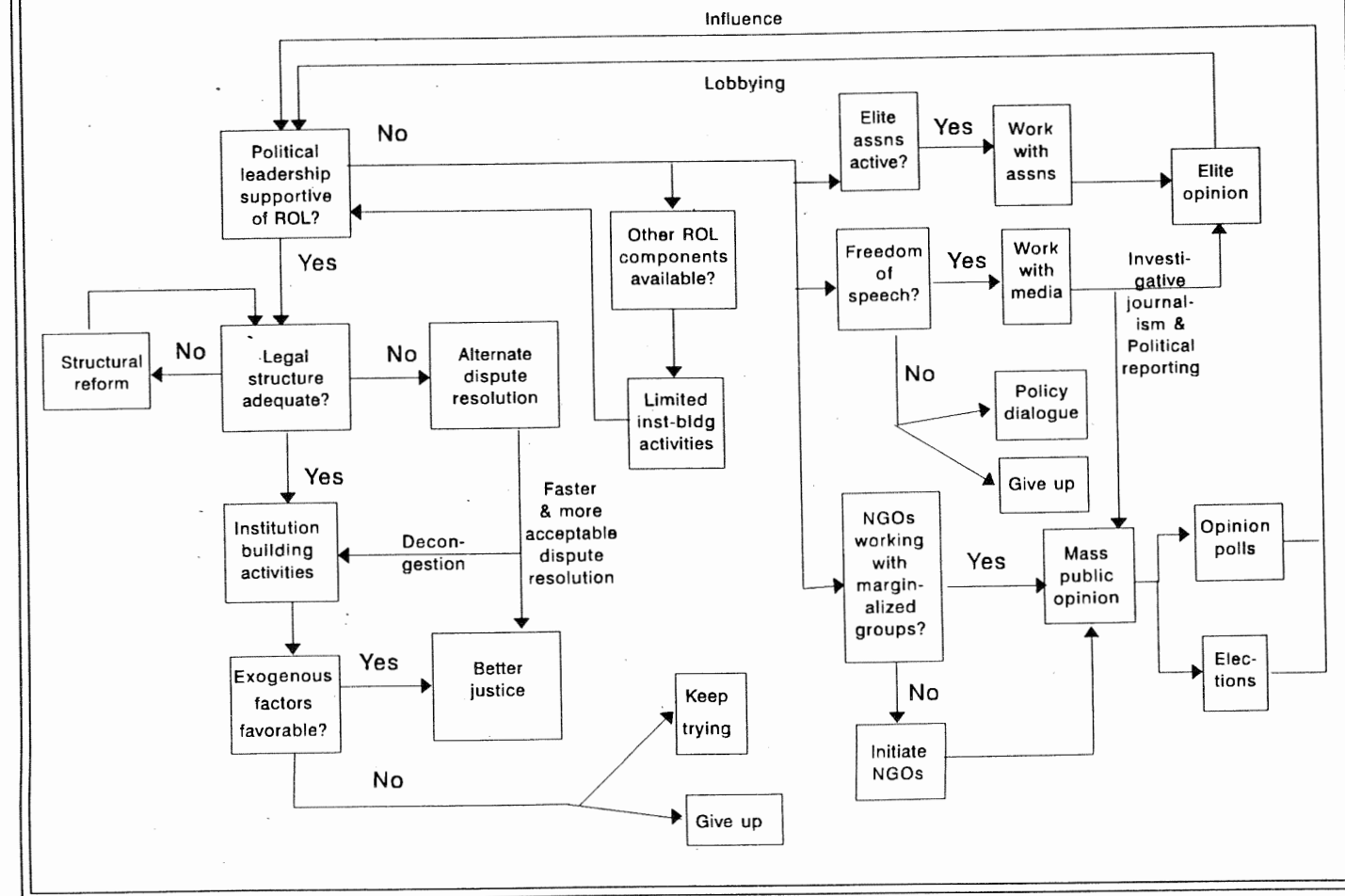
Indicator	Year	Argentina	Colombia	Honduras	Philippines	Sri Lanka	Uruguay
Per capita GNP (US\$)	1988	2,520	1,180	860	630	420	2,470
Real GDP per capita (\$PPP)	1985-88	4,360	3,810	1,490	2,170	2,120	5,790
Human Development Index	late 1980s	.854	.757	.492	.613	.665	.905
Infant mortality (per 1,000 births)	1989	23	39	66	44	27	31
Adult literacy (in %)	1985	94.8	84.7	68.0	87.7	86.7	95.3
Life expectancy at birth (years)	1990	71.0	68.8	64.9	64.2	70.9	72.2
Political rights index	1992	2	2	2	3	4	1
Civil liberties index	1992	3	4	3	3	5	2
Freedom rating	1992	Free	Partly free	Free	Partly free	Partly free	Free
Legal system		Civil code	Civil code	Civil code	Common law	Common law	Civil code

NOTES: Real GDP in \$PPP is a figure based on an internationally comparable scale using "purchasing power parities" (PPP) and expressed in PPP international dollars. It attempts to measure the relative purchasing power of per capita GDP. The human development index is based on a number of "physical quality of life" measures and ranges from .993 (for Japan) to .048 (for Sierra Leone) over 160 nations. Uruguay ranks 32nd on this list, and Honduras ranks 100th.

Source: For data on rights and liberties, Freedom House (1993); for all other data, United Nations Development Programme (1991).

Appendix Figure 1

An Analytical Tree for Supporting Rule of Law Development





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